

# **DOMESTIC VIOLENCE CRIMINAL BENCHBOOK**

*Prepared by*  
**The Committee on the Impact of  
Domestic Violence and the Courts  
and  
Domestic Violence Criminal Benchbook Workgroup**



**For all Arizona courts**

**February 2004**

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# DOMESTIC VIOLENCE CRIMINAL BENCHBOOK AND REFERENCE

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# **Chapter I**

## **Introduction**

This benchbook was put together by members of the Committee on the Impact of Domestic Violence and the Courts (CIDVC) with the assistance from the Supreme Court's Administrative Office of the Courts, Court Services Division, (AOC) with the hope that it will assist judges at all levels in the effective and efficient administration of criminal domestic violence cases.

This benchbook is a companion to and supplement of CIDVC's *Domestic Violence Benchbook* that has become a valuable tool in assisting judges throughout the State of Arizona in dealing with civil domestic violence orders. We hope that this benchbook achieves the same result in the area of criminal domestic violence cases and that you find this benchbook a practical and useful tool that you reference often. The Committee sought to provide judges with accurate and up-to-date information. The law is subject to change, however, and it is important for judges to be aware that some information in the benchbook may become outdated. As with the *Domestic Violence Benchbook*, CIDVC will periodically update this benchbook, and we look forward to improving it with your input. However, judges should independently stay current with the law.

The benchbook is organized to provide a judge with pertinent information on all stages of a criminal proceeding. The information in the benchbook is provided in a chronological fashion, from defining a crime of domestic violence, to the initial appearance, release considerations, evidentiary and sentencing considerations, up to and including post sentencing concerns. The rights of victims in criminal domestic violence cases are an important consideration and are interwoven throughout the text.

## **Chapter II**

### **Statutory Provisions**

Arizona Revised Statutes (A.R.S.) § 13-3601 brought together a number of existing crimes and categorized them as a class of crimes constituting domestic violence. Except for Aggravated Domestic Violence, there is no separate crime of domestic violence. The crimes listed have special meanings and are treated differently when the relationship of the victim and the defendant meets certain requirements. A.R.S. § 13-3601 *et seq.* outlines a two-step test to determine if a crime constitutes domestic violence: 1) a relationship as defined in the statute must exist between the parties, and 2) the crime must be one contained in the statute list contained in Section B.

#### **A. Relationship**

The defendant and the victim must meet the relationship test as outlined in A.R.S. § 13-3601(A)(1).

Note: The listed plaintiff on an OP/IAH shall not be charged, arrested or convicted for violating an order obtained on his/her behalf.

##### **1. Definition**

The defendant and the victim must be in one of the following relationships:

- a. Are or were married.
- b. Are persons who reside or have resided in the same household.
- c. Have a child in common or if the victim or the defendant is pregnant by the other.
- d. Related by blood such as a person's parents, grandparents, children, grandchildren, brothers and sisters.
- e. Related by marriage such as spouses, parents-in-law, step-children and brothers- and sisters-in-law.

##### **2. Aggravated Offenses**

Aggravated Domestic Violence only applies to dates of violation when there are three or more offenses that all occurred after January 1, 1999. Aggravated domestic violence applies only if the prior offense occurred within 60 months of the pending charge. The victim need not be the same in each offense.

Aggravated Harassment does require that the defendant and the victim be the same in any prior domestic violence conviction when the new charge is a Class 5 Felony.

## **B. Crimes of Domestic Violence**

The crime must be listed in A.R.S. § 13-3601(A). Crimes are listed as follows:

**§ 13-604.01 Dangerous Crimes Against Children**

**§ 13-1201 Endangerment**

**§ 13-1202 Threatening or Intimidating**

**§ 13-1203 Assault**

**§ 13-1204 Aggravated Assault**

**§ 13-1302 Custodial Interference**

**§ 13-1303 Unlawful Imprisonment**

**§ 13-1304 Kidnapping**

**§ 13-1502 Criminal Trespass, 3rd degree**

**§ 13-1503 Criminal Trespass, 2nd degree**

**§ 13-1504 Criminal Trespass, 1st degree**

**§ 13-1602 Criminal Damage**

The criminal damage statute was revised to comply with case law. A person can be guilty of damaging her/his own property if it is community property or held in joint tenancy.

**§ 13-2810 Interfering with Judicial Proceedings**

Except for Emergency Orders of Protection, the crime of Interference with Judicial Proceedings, in part, requires proof that an Order was issued and served. Because an Order is not valid until it is served, proof of service by a law enforcement officer or a private process server is required (see Rule 4, Arizona Rules of Civil Procedure). Hearsay statements are not a substitute for this requirement unless the statements qualify as one of the hearsay exceptions (see H2. on pages 46 and 47 that follow). NOTE: Although private process servers must notarize their Affidavit of Service, law enforcement officers, peace officers, corrections officers, etc. do not need to notarize their signatures (see A.R.S. § 13-3602).

**§ 13-2904 Disorderly Conduct**

**§ 13-2916 Using the Telephone to Harass**

Initially, the use of the telephone to harass statute was declared unconstitutional by the Court of Appeals but that ruling was reversed by the Supreme Court. Prior to the reversal, the statute was changed to address the concerns of the appellate court.

**§ 13-2921 Harassment**

**§ 13-2921.01 Aggravated Harassment**

**§ 13-2923 Stalking**

**§ 13-3019 Surreptitiously Photographing, Videotaping a Person**

**§ 13-3601.02 Aggravated Domestic Violence**

**§ 13-3623 Child or Vulnerable Adult Abuse**

## **1. Justification Defense**

A.R.S. § 13-415 creates a different “reasonable person” standard for the justification defense for defendants who have been victims of domestic violence. The statute indicates that the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of past acts of domestic violence.

## **2. Victim Inviting Contact (Waiver)**

The victim inviting contact (or waiver) is not a defense to an OP violation. Only the court can modify the OP, and the actions of the plaintiff, or any other person, cannot nullify the order.

The Criminal Benchbook Advisory Workgroup has not found a published Arizona case that allowed waiver as a legal defense.

# **C. Use of Computer to Commit Domestic Violence Crimes**

With the increase in technology the courts will see more cases in which domestic violence perpetrators use the computer to stalk, harass, or threaten their victims. These cases can pose many challenges for the court with regards to evidentiary issues and sentencing options.

## **1. Cyber Stalking**

Although many cases do not manifest themselves outside of the confines of the “cyber realm,” keep in mind that this type of harassment can be just as upsetting to the victim. Victims in these types of cases may suffer not only physical and emotional harm, but also may suffer financial hardship. You may see cases involving cyber aspects in the following areas: violations of orders of protection, harassment, stalking, or threatening and intimidating behavior. This may include the use of E-mail to harass the victim directly, posting the victim’s name, phone number, or E-mail address in a newsgroup or chat room in order to solicit third person harassment of the victim, preparing of websites designed to harass the victim by displaying personal or pornographic material involving the victim, or the use of the computer to access the victim’s personal or financial information. A.R.S. § 13-2316 computer tampering is also included as a cyber stalking crime. Although Arizona has no specific Cyber Stalking statute, existing laws dealing with harassment do cover these types of cases. Additionally, no federal legislation is in place that deals specifically with Cyber Stalking.

## **2. E-mail stalking**

Often the abuser will utilize anonymous E-mail addresses in order to accomplish this. It is very simple for a person to obtain one or several E-mail accounts in several different names, as Internet providers do not confirm a person’s identity prior to

issuing an E-mail account. Such forms of harassment should also be considered when issuing an Order of Protection.

## **D. Jury Trial Eligibility**

Pursuant to A.R.S. § 13-3602 a violation of a protective order should result in a charge of “interfering with judicial proceedings,” A.R.S. § 13-2810(A)(2), which is a Class 1 Misdemeanor and not jury eligible. This charge is in addition to any other criminal act committed by the defendant while violating the protective order. All of the standardized protective orders contain the following warning pursuant to A.R.S. § 13-3602(J):

This is an official court Order. If you disobey this Order, you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this Order.

The penalty for an A.R.S. § 13-2810 violation is up to six months in jail and a \$2,500 fine. Arizona courts have looked at the length of possible incarceration as a highly important factor on whether a jury trial is required. At this point jury status has not been extended to misdemeanor assault and violation of protective order cases. The labeling of a complaint as one involving domestic violence does not change the substantive charge. Though a crime may be labeled as domestic violence, the label does not make the charge jury eligible. Cases which support this position include:

State ex rel. McDougal v. Strohson, 190 Ariz. 120, 945 P.2d 1251 (1997).

State ex rel. Dean v. Donly, 161 Ariz. 431, 531 P.2d 1138 (1975).

Goldman v. Kautz, 11 Ariz. 431, 531 P.2d 1138 (1975).

Rothwieler v. Superior Court, 100 Ariz. 27, 410 P.2d 470 (1966).

## **E. Protective Orders**

### **1. Presumption and Validity**

A.R.S. § 13-3602(I) states that the effectiveness of an order does not depend on its registration with the sheriff’s office or entry into a database. A copy of the order, whether or not registered, is presumed to be valid for purposes of A.R.S. § 13-2810, Interference with Judicial Proceedings.

Any court in this state has jurisdiction to enforce an order of protection that has been issued in this state and has been violated in any jurisdiction of this state. (A.R.S. § 13-3602(M)). No order of protection shall be declared invalid because a lower court issued it when there was a domestic relations matter pending in superior court. (A.R.S. § 13-3602(O)).

## **2. Service**

A.R.S. § 13-3602(D) states that upon request of the plaintiff, an order issued by a municipal court shall be served by the police agency of that city if the defendant can be served in the city. If the defendant cannot be served in that city, the police agency of the city in which the defendant can be served shall serve the order. If the order cannot be served in a city, the sheriff shall serve it.

On request of a plaintiff, the constable or the sheriff shall serve an order issued by the justice of the peace. If the defendant cannot be served in that jurisdiction, the constable or sheriff in the jurisdiction where the defendant is located shall serve the order.

The petition and order shall be served on the defendant within one year from the date of issuance. If the order has expired, the plaintiff may request that a JO issue a new order. Service of an order of protection has priority over other service that does not involve an immediate threat to the safety of a person. (A.R.S. § 13-3602(Q)).

Proof of service by law enforcement or a private process server is required pursuant to Rule 4 of the Arizona Rules of Civil Procedure (A.R.C.P.). A certificate of service by a law enforcement officer does not need to be notarized because of A.R.S. § 13-3602 that gives law enforcement the ability to provide service. However, A.R.C.P., Rule 4 requires an Affidavit of Service to be notarized when orders are served by private process servers.

Rule 902.1 of Arizona Rules of Evidence provides the method by which certificates of service can be determined to be self-authenticating documents. This means that a properly certified certificate and protective order can be admitted into evidence without the necessity of the custodian of records appearing in court.

If a person named in the order has not received personal service of an EOP but has received actual notice of the existence and substance of the EOP commits an act that violates the emergency order, the person is subject to any penalty permitted for the violation. (A.R.S. § 13-3624(F)).

Note: As of January 22, 2004, the Law Enforcement Protective Order Repository (LPOR) will be accessible to law enforcement to query or verify the existence and/or service of protective orders.

## **Chapter III**

### **Full Faith and Credit**

#### **A. Arizona's Full Faith and Credit Statute: (A.R.S. § 13-3602 (R)).**

1. A valid protective order that is related to domestic or family violence and that is issued by a court in another state, a court of a United States territory or a tribal court shall be accorded full faith and credit and shall be enforced as if it were issued in this State for as long as the order is effective in the issuing jurisdiction.

2. This statute states:

A protective order includes any injunction or other order that is issued for the purpose of preventing violent or threatening acts or harassment against, contact or communication with or physical proximity to, another person. A protective order includes temporary and final orders other than support or child custody orders that are issued by civil and criminal courts if the order is obtained by the filing of an independent action or is a *pendente lite* order in another proceeding. The civil order shall be issued in response to a complaint, petition or motion that was filed by or on behalf of a person seeking protection.

- a. A protective order is valid if the issuing court had jurisdiction over the parties and the matter under the laws of the issuing state, a United States territory or an Indian tribe and the person against whom the order was issued had reasonable notice and an opportunity to be heard. If the order is issued *ex parte*, the notice and opportunity to be heard shall be provided within the time required by the laws of the issuing State, a United States territory or an Indian tribe and within a reasonable time after the order was issued.
- b. A mutual protective order issued against both the party who filed a petition or a complaint or otherwise filed a written pleading for protection against abuse and the person against whom the filing was made is not entitled to full faith and credit if either:
  - i. The person against whom an initial order was sought has not filed a cross or counter petition or other written pleading seeking a protective order.
  - ii. The issuing court failed to make specific findings supporting the entitlement of both parties to be granted a protective order.

#### **B. Enforcement**

1. From an enforcement perspective, the statute states that a law enforcement officer may presume the validity of and rely on a copy of a protective order that is issued by

another state, a United States territory or an Indian tribe if the order was given to the officer by any source. (A.R.S. § 13-3602(R)(4))

2. A law enforcement officer also may rely on the statement of any person who is protected by the order that the order remains in effect. Immunity from civil or criminal liability for enforcing the protective order is provided for a law enforcement officer who acts in good faith reliance on a protective order. (A.R.S. § 13-3602(P))

## **C. Violence Against Women Act (VAWA)**

Under the federal Violence Against Women Act (VAWA), 18 U.S.C. §§ 2261 and 2262, and A.R.S. § 13-3602(R) jurisdictions must give full faith and credit to valid orders of protection issued by other jurisdictions. Simply put, courts in Arizona must honor orders from other states and jurisdictions including tribal courts.

The federal law does not require registration or filing of orders of protection in this state to make them valid; however, it may be beneficial to do it because it will be more easily recognized and enforced by local police. To domesticate a foreign order, an authenticated copy must be filed in the superior court. (A.R.S. § 12-1702). The clerk shall treat the judgment in the same manner as a judgment of the superior court of this state. Such judgment has the same effect and is subject to the same procedures and enforcement as an Arizona order.

The federal law also does not require that the order be certified or authenticated. Arizona law does not require authentication if the order is to be registered locally.

## **D. Federal Crimes**

The provisions of the Crime Control Act (Subtitle B: Safe Homes for Women of VAWA) regarding interstate travel and the possession of firearms are of particular interest from the standpoint of federal prosecution.

1. 18 U.S.C. § 2262(a) makes it criminal for a person to travel across a state line or to enter or leave Indian country with the intent to violate an order that protects against “credible threats of violence, repeated harassment, or bodily injury.”
2. It is also a crime to cause a spouse or intimate partner to cross a state line or to enter or leave Indian country by force, coercion, duress, or fraud, and thereby intentionally commit an act that injures the spouse or partner in violation of a valid protection order.

Properly implemented, these provisions may serve to reduce fatalities and serious injuries to domestic violence victims. Standardized forms for OP, IAH and IAWH cases have been adopted for statewide use by the Arizona Supreme Court. Included in these forms is language necessary to establish the basis of federal prosecution if an

order is violated. If the perpetrator has committed any of the following crimes, the case should be referred to the U.S. Attorney's Office for prosecution under VAWA:

- a. Interstate travel to commit domestic violence;
- b. Interstate stalking;
- c. Interstate violation of an Order of Protection.

## **Chapter IV**

### **Firearms and Ammunition**

#### **A. Firearms Prohibition /Transfer**

At an *ex parte* hearing, if a Judicial Officer finds that the defendant is a credible threat to the physical safety of the plaintiff or specifically designated person(s), then the Judicial Officer may prohibit the defendant from possessing or purchasing a firearm for the duration of the OP. (A.R.S. § 13-3602(G)(4)).

1. Credible threat is not limited to the use of a firearm, but also extends to the threatened use of a firearm, use or threatened use of other dangerous weapons, and other actions which place the plaintiff or other specifically designated persons in fear of bodily harm or death. (A.R.S. § 13-3602(G)(4)).
2. If the Judicial Officer prohibits the defendant from possessing a firearm, the Judicial Officer shall also order the defendant to transfer any firearm owned or possessed by the defendant, immediately after service of the OP, to the appropriate law enforcement agency. (A.R.S. § 13-3602(G)(4)).

If a Judicial Officer issues, affirms or modifies an OP after a hearing in which 1) the defendant received actual notice, 2) the defendant had an opportunity to participate, and 3) the Brady Law “intimate partner” relationship test is satisfied, then the Brady Law prohibitions apply. (18 U.S.C. 921 *et seq.*). Intimate partner is defined as the spouse or former spouse of the defendant, an individual who is a parent of a child of the defendant, and an individual who cohabitates or has cohabited with the defendant.

Note: In an IAH, the Judicial Officer may have discretion to prohibit firearms.

If there was no change at the hearing, the Notice to Sheriff of Brady Disqualification should be generated with a copy to the defendant.

#### **B. Arizona Firearms Prohibition**

The Arizona firearms prohibition, A.R.S. § 13-3602(G)(4), is different in its effect from the federal Brady Amendment in that there is no exemption from firearms restrictions applicable to departments or agencies of the United States or departments, agencies or political subdivisions of any state. Additionally, the state prohibition can apply to an *ex parte* order. Functionally, this means that state prohibitions against purchase or possession of firearms now also apply to members of the military and federal and state law enforcement personnel in Arizona.

1. The standardized OP form adopted by the Arizona Supreme Court is designed to facilitate application and recognition of firearms prohibitions.

The “Weapons” paragraph of the form may be used to indicate that the defendant represents a credible threat to the physical safety of a victim or specified other parties and enact the Arizona prohibition against the possession of firearms.

2. When an order originally issued at an *ex parte* hearing is affirmed at a subsequent hearing, Federal Brady prohibitions shall automatically attach if certain relationships exist. This is a direct result of US v. Emerson, F3rd 203 (5<sup>th</sup> Cir. 2001).

If there was no change at the hearing, the Notice to Sheriff of Brady Disqualification should be generated with a copy to the defendant.

### **C. Federal Firearms Prohibition/Transfer**

The Gun Control Act of 1968 (Title 18 U.S.C. § 921 *et seq.*) established a detailed federal scheme governing the distribution of firearms. It makes it unlawful for certain categories of persons to ship, transport, receive or possess firearms.

1. Transfer of firearms to any such prohibited persons is unlawful.

Congress amended the Gun Control Act in 1993 with the Brady Handgun Violence Prevention Act (P.L. 103-159) or “Brady Law.” The Brady Law required that the backgrounds of perspective handgun purchasers be checked to ensure that the sale of a handgun to the perspective purchaser is legal.

2. The Crime Control Act extends prohibitions regarding the purchase or possession of firearms or ammunition to persons who are the subjects of certain domestic violence protective orders.

It is unlawful for such persons to ship, transport or possess in interstate or foreign commerce firearms or ammunition or to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. (18 U.S.C. § 922(g)).

3. The Brady firearms prohibition applies only to certain protective orders if:

- a. There is a qualifying protective order which was issued after a hearing in which the defendant received actual notice and at which the defendant had an opportunity to participate, AND

- b. The protective order involves a plaintiff and defendant who are intimate partners as defined below.

The term “intimate Partner” is defined in federal law (18 U.S.C. § 921(a)(32)) as:

- i. The spouse or former spouse of the defendant, an individual who is a parent of a child of the defendant, and an individual who cohabitates or has cohabited with the defendant.

- ii. Not all parties to an OP will meet the Federal “intimate partner” test. For example, under A.R.S. § 13-3601(A), an order may be granted in favor of a defendant’s father-in-law. However, because a father-in-law is not included in the federal law definition of “intimate partner,” a protective order in favor of the father-in-law would not disqualify the defendant from purchasing a weapon under the provision of the Federal Crime Control act.
  - c. Because most Arizona domestic violence protective orders are issued *ex parte*, the Brady prohibition does not take effect at the time the OP is issued.
  - d. If a court initially denies the plaintiff’s petition and sets a hearing, or when the defendant requires a hearing after issuance of an *ex parte* order, the protective order subsequently issued or continued will qualify for the Brady firearms prohibition, if the relationship test is met. Thus, if a defendant requires a hearing and receives actual notice of the date and time set but, nevertheless, fails to appear, the “opportunity” requirement will be satisfied.
4. Exemption

Title 18 U.S.C. § 925(a) provides an exemption for military and law enforcement while the person is on duty. There is no exemption under the state prohibition of weapons law for military or law enforcement. A.R.S. § 13-3602(G).

## **D. Federal Versus State Provisions**

It is important to distinguish Federal law requirements from Arizona state law regarding firearms in domestic violence cases.

- 1. Under A.R.S. § 13-3602(G):
  - a. An *ex parte* order may, for its duration, prohibit the defendant from purchasing or possessing a firearm.
  - b. An *ex parte* order may also direct the transfer of a firearm to an appropriate law enforcement agency if the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons. This is independent from the Federal firearms prohibitions.
  - c. The only relationship required between the parties is defined in A.R.S. § 13-3601(A).
  - d. The “Weapons” paragraph of the Arizona Supreme Court approved OP forms is designed to accommodate state law by providing a separate box to be marked indicating that the requisite finding is made, firearm possession is prohibited, and transfer is ordered.

## **E. Lautenberg Amendment**

The Omnibus Consolidation Appropriations Act of 1997 (P.L. 104-208) is referred to as the Lautenberg Amendment, with modifications to 18 U.S.C. §§ 922(d) and (g), prohibits a person convicted of a misdemeanor crime of domestic violence from purchasing or possessing a firearm or ammunition. The Lautenberg Amendment applies to criminal domestic violence cases, but need not be considered in the issuance of domestic violence protective orders.

1. The Lautenberg restrictions on the purchase and possession of firearms do not apply to all convictions. The term “misdemeanor crime of domestic violence” is specifically defined under 18 U.S.C. § 925(a)(33)(A) as a misdemeanor under state or federal law involving the use or attempted use of any physical force, or the threatened use of a deadly weapon.
2. The misdemeanor must have been committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or who has cohabited with the victim as a spouse, parent or guardian, or by a person similarly situated.

## **Chapter V**

### **Other Implication of Federal Legislation**

The Violent Crime Control and Law Enforcement Act of 1994 also contains other important domestic violence-related provisions. Criminal penalties are imposed upon persons who cross state lines with the intent to engage in conduct that violates a protective order. Persons subject to a court orders that restrain harassing, stalking or threatening an intimate partner or child are prohibited from receiving firearms. Dissemination of information from national crime information databases to state criminal and civil courts is authorized for use in domestic violence and stalking cases.

The provisions of the Crime Control Act regarding interstate travel and the possession of firearms are of particular interest from the standpoint of federal prosecution. Properly implemented, these provisions may serve to reduce fatalities and serious injuries to domestic violence victims. Standardized forms for protective order cases have been adopted for statewide use by the Arizona Supreme Court. Included in these forms is language necessary to establish the basis of federal prosecution if an order is violated.

#### **A. Crossing State or Tribal Lines**

Subtitle B (Safe Homes for Women) of VAWA amends federal criminal statutes by adding a chapter devoted to interstate domestic violence.

1. 18 U.S.C. § 2262(a) makes it criminal for a person to travel across a state line or to enter or leave Indian country with the intent to violate an order that protects against “credible threats of violence, repeated harassment, or bodily injury.”
2. It is also a crime to cause a spouse or intimate partner to cross a state line or to enter or leave Indian country by force, coercion, duress, or fraud, and thereby intentionally commit an act that injures the spouse or partner in violation of a valid protection order.

#### **B. Access to Federal Information**

Another VAWA provision of the Crime Control Act grants courts the authority to access federal domestic violence records. In a subtitle identified as “National Stalker and Domestic Violence Reduction” (codified at 28 U.S.C. § 534), VAWA authorizes dissemination of information from national crime information databases including identification information, criminal history records, protection orders and wanted person records to civil and criminal courts for use in domestic violence or stalking cases. A companion provision grants authority to federal and state criminal justice agencies to include in the records of the National Crime Information Center (NCIC) information regarding arrests, convictions and arrest warrants for domestic violence or for violation of domestic violence protection orders. Because NCIC records are drawn from nationwide sources, courts will have access to comprehensive information regarding a defendant for purposes of sentencing, applying repeat offender statutes or affording full faith and credit to orders of other jurisdictions. (NOTE: NCIC

records capture some of the protection orders issued, but not all of them. NCIC may be used as a resource, but should not be exclusively relied upon.)

## C. National Protective Order Database

In response to the various provisions of the Crime Control Act, in May 1997, the FBI initiated a Protective Order File (POF) within the national federal database of criminal records to collect data concerning protective orders.

1. Criteria for entry of data has been developed at the national level and include strict compliance protocols.

In Arizona, DPS administers the database and certain law enforcement agencies have assumed responsibility for entering information from protective orders.

2. The standardized Arizona Supreme Court forms have been structured to capture necessary data entry elements and to present information in a manner that will facilitate data entry.
3. Neither a copy nor the entire text of each protective order will be entered into the NCIC database.

Instead, Protective Order Condition codes (PCO codes) have been developed for mandatory entry into the POF. These identify by numeric reference the specific terms and conditions imposed by a court in a domestic violence protective order. Using this shorthand reference, law enforcement officers or other system users (including courts) will have knowledge of prohibitions, restrictions or other provisions contained in particular protective orders without needing or having access to the order itself. In order to be entered into the POF the particular PCO codes or court forms must be formatted with particular provisions numbered and sequenced to correspond with these codes.

4. The Arizona Supreme Court approved forms include paragraph headings that data entry personnel may match with the codes to avoid the necessity for Judicial Officers to list specific PCO code numbers. (See the *Domestic Violence Benchbook*, **Appendix A** for forms).

The paragraphs in the domestic violence forms match PCO codes which are used by DPS to match particular provisions of protective orders. DPS trains their data entry people using a template of the forms to indicate the matching PCO codes. As such, any alteration of the standardized protective order forms **MUST** receive prior approval from the Administrative Office of the Courts **PRIOR** to the use of the altered form. Otherwise the **WRONG** codes will be entered into the NCIC system. (A.C.J.A. § 5-207).

## **D. Undocumented Immigrant Victims**

VAWA II also clarified protections available to battered immigrant women and their children.

1. Specifically, Subtitle A, Section 1103 improves access to immigration protections to allow a battered immigrant to file a petition for self (and for any child of the alien) with the Attorney General for immediate relative immigrant classification.

If during the marriage (or relationship intended to be a legal marriage), the immigrant spouse or the child of the immigrant spouse has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse, the battered immigrant may file for relative immigrant status.

2. Implicit with this protection is the suspension of deportation procedures until the Attorney General can determine if the deportation would result in extreme hardship to the petitioning alien or any child of the alien.

The intent is to offer protection against domestic violence occurring in family and intimate relationships of immigrant persons who are covered in state and tribal protection orders, domestic violence, and family law statutes. It also removes the barriers to criminal prosecutions of persons who commit battery or extreme cruelty against immigrant women and children.

## **Chapter VI**

### **Court Environment**

There are few things that take place in the course of the legal proceedings surrounding a domestic violence case or order of protection that are more important than the manner in which the court conducts and projects itself. The manner in which the judge and staff conduct themselves sends a message about the importance of recognizing all aspects of a legal proceeding connected with a domestic violence matter.

#### **A. Setting the Tone**

It is essential that the judge and staff set the tone for all proceedings. Matters should be called and heard promptly. All attention should be focused on the matter at hand. The bearing and attitude of the court and staff should reflect the gravity of the matter and be equally directed towards both the state and the Defense. In a typical situation, the parties are milling around in the rear of the courtroom. Attention should be given to the separation of the respective parties, including their family and friends, to prevent coercion or intimidation.

#### **B. Spectators and Witnesses**

Frequently, relatives, friends and supporters accompany both the defendant and the victim. Often times, these parties are directly interested or involved in the proceedings. Frequently a new partner, sympathetic relatives, or friends accompany the defendant. Similarly, an advocate, sympathetic friend or relative may accompany the victim. Steps must be taken at the outset to establish ground rules for the conduct of such parties. It is particularly helpful to be mindful of the provisions of Arizona Rules for Criminal Proceedings (A.R.Cr.P. Rule 9.3(a) that allows the court to exclude prospective witnesses from the courtroom during opening statements and the testimony of witnesses. The language of the same rule provides that: “The court shall also direct them not to communicate with each other until all have testified” provides an effective and legal means to segregate and separate witnesses.

Begin the proceeding by announcing that histrionics such as expressions of disbelief, sighs, rolling of the eyes and supportive nods will not be tolerated. Advise the parties that such conduct makes it more difficult for the judge to concentrate on the testimony needed to make the proper decision. If a judge observes such conduct, the judge should stop the proceedings, admonish the offending party and advise that if it happens again, the party so conducting himself or herself will be removed from the courtroom. If it does happen again, remove that person. The effect will be immediate.

#### **C. Victims**

Due to a number of circumstances, victims frequently appear at court proceedings accompanied by the defendant. Great caution should be exercised to prevent the defendant from exerting influence on the victim. Frequently court environments are cramped and permit all parties, both defendant and victim, to be in close proximity. The judge must

emphasize and take steps to insure that the proceedings are to get the true facts of the situation, free of influence or duress.

The court should be particularly cognizant of the possibility of the defendant “mad dogging” or glaring at the victim, both before and during testimony. Such behavior should be put on the record, and the defendant should be cautioned to refrain from exhibiting intimidating behavior. Often times, because of the design of the courtroom, the defendant at counsel table and the victim at the prosecution table may be side by side. Similarly, although the victim and the defendant may not be in close contact, interested parties may approach the victim or the defendant from either side.

## **D. Offenders**

All parties to any legal proceedings are entitled to respect and dignity. The court should emphasize before the proceedings begin that such respect and dignity are the rights of all parties before the court and that parties who refuse to give the other such courtesy will be sanctioned. The judge should clarify again that such conduct as sneering, laughing, sighing, and rolling of the head or eyes, whether verbal or by body language is not respectful and will not be tolerated. The judge should establish clearly that the behavior will be put on the record, and after one instance and warning, the offending party will be excluded from the proceeding pursuant to A.R.Cr.P. Rules 9.2(a), 9.3(b) and Rule 9.3(c).

## **E. Victims’ Rights**

### **1. General**

Crime victims’ rights are set forth in detail under A.R.Cr.P. Rule 39 and A.R.S. § 13-4401 through § 4438. A review of these provisions provides clear guidance as to the rights that must be afforded victims. Some provisions of note are in A.R.S. § 13-4407 that provides, upon victim request, that the custodial agency shall provide the victim with a copy of the terms and conditions of release. In many jurisdictions, the citation form includes a box that the officer can check which triggers the invocation of rights by the victim. A.R.S. §§ 13-4419 through 4426 give the victim the right to be present and heard at all stages of a criminal proceeding from initial appearance through sentencing. Good practice by the court would suggest that in all proceedings, an inquiry is to be made on the record and in writing as to whether the victim is present and wishes to address the court. A.R.S. § 13-4430 closely defines the interaction between a victim and an advocate and establishes a privilege protecting such communication.

### **2. Safety Issues**

A.R.S. § 13-4431 specifically provides:

Before, during and immediately after any court proceeding, the court shall provide appropriate safeguards to minimize the contact that occurs between the victim, the victim’s immediate family and the

victim's witnesses and the defendant, the defendant's immediate family and defense witnesses.

This is a clear legislative statement of our duties and should be taken seriously.

### **3. Constitutional Rights**

Victims' rights in the criminal system are outlined in two places under Arizona law. As stated in the Constitution (Article 2.1), a victim has a right:

- a. To be treated with fairness, respect and dignity and to be free from intimidation, harassment or abuse;
- b. To be informed, upon request, when the accused or convicted person is released or has escaped;
- c. To be present at and, upon request, to be informed of all criminal proceedings;
- d. To be heard at a post-arrest release, negotiated plea and sentencing;
- e. To refuse an interview or discovery request;
- f. To confer with prosecution;
- g. To read pre-sentence reports;
- h. To receive prompt restitution;
- i. To be heard at any proceeding when any post-conviction release is considered;
- j. To a speedy trial or disposition;
- k. To have all rules protect victims' rights; and
- l. To be informed of victims constitutional rights.

A victim's exercise of any right shall not be grounds for dismissing any criminal proceeding. The victim can decide whether to make a statement orally, in writing, or by audio or videotape (A.R.S. § 13-4428). The legislature also has given victims of crimes rights implementing the constitutional values. The law enforcement agency must inform the victim of the rights available. The rights are invoked by the victim, who must maintain an updated address with the relevant agency in order for the rights to apply (A.R.S. § 13-4417).

#### **4. Statutory Rights**

Specifically, the victim has the following rights:

**a. Notice of initial appearance**

The victim has the right to be notified of the date, time and place of the initial appearance either by law enforcement or the prosecutor (A.R.S. § 13-4406). The victim has a right to be heard at that initial appearance. (A.R.S. § 13-4421).

**b. Notice of terms and conditions of release**

Upon request of the victim the custodial agency or the prosecutor shall give the victim notice of the terms and conditions of release of the accused (A.R.S. § 13-4407). The victim has the right to be heard at any post-arrest custody decisions. (A.R.S. § 13-4422).

**c. Pretrial notice**

Within seven days of charging, the prosecutor shall give the victim notice of her/his rights as a victim, the charge(s), the procedural steps, what the victim must do, and provide her with a contact person. If the prosecutor decides to drop the case, s/he must notify the victim and explain why. The victim can request to confer with the prosecutor prior to dismissing the charges. (A.R.S. § 13-4408). If there is plea bargaining, upon request, the victim has a right to be present and heard when it is presented to the court. (A.R.S. § 13-4423).

**d. Notice of criminal proceedings**

The prosecutor shall pass on notice of proceedings as received from the court. (A.R.S. § 13-4409). The victim has the right to be present at all criminal proceedings in which the defendant has the right to be present. (A.R.S. § 13-4420).

**e. Notice of conviction, acquittal or dismissal and impact statement**

Within 15 days of the decision, the prosecutor shall notify the victim. If the defendant is convicted, the prosecutor shall notify the victim of the right to submit an impact statement and what it should contain among other things. (A.R.S. §§ 13-4410, 13-4424). The victim can look at the pre-sentence report. (A.R.S. § 13-4425). The victim can be present at sentencing and present evidence, information and opinions. (A.R.S. § 13-4426).

**f. Notice of post-conviction review and appellate proceedings**

Within 15 days of the sentencing, the prosecutor shall notify the victim of the sentence and provide a form to request release information. Any change in sentence due to post-conviction proceedings or appellate review must be sent to the victim. (A.R.S. § 13-4411).

**g. Notice of right to request not to receive inmate mail**

Within 15 days of commitment, the prosecutor shall notify the victim of the right not to receive inmate mail. (A.R.S. § 13-4411.01).

**h. Notice of release on bond or escape**

If requested by the victim, the custodial agency shall notify the victim of release or escape and recapture. (A.R.S. § 13-4412).

**i. Notice of prisoner's status**

The custodial agency shall notify the victim of the release date at least 15 days prior to release. (A.R.S. § 13-4413).

**j. Notice of post-conviction release**

The victim has a right to be notified at least 15 days before and heard at any meeting of the board of pardons and paroles concerning the defendant. (A.R.S. § 13-4414).

**k. Notice of probation modification**

The victim has a right to be notified of any probation revocation hearing (A.R.S. § 13-4415) and to be present and heard (A.R.S. § 13-4427).

**l. Notice of release, discharge, or escape from a mental health treatment agency**

A mental health agency must give the victim an immediate notice of the escape of a patient or a 10 day notice of the release. (A.R.S. § 13-4416).

**m. Victim conference with prosecuting attorney**

On request, the prosecuting attorney shall confer with the victim about disposition. This does not mean the victim can direct the prosecution of the case. (A.R.S. § 13-4419).

**n. Return of victim's property; release of evidence**

On request and after consultation with the prosecutor, the law enforcement agency shall return victims' property as soon as possible. (A.R.S. § 13-4429).

**o. Consultation between crime victim's advocate and victim**

A crime victim advocate shall not disclose confidential communications. (A.R.S. § 13-4430). (For more information *see* AzCADV's Confidentiality for Domestic Violence Service Providers in Arizona under Federal and State Law.)

**p. Minimizing victim's contacts**

Before, during and immediately after any court proceeding, the court shall provide safeguards to minimize contact between the victim, victim's family, and witnesses and the defendant, defendant's family and witnesses. (A.R.S. § 13-4431).

**q. Motion to revoke bond or personal recognizance**

The victim can ask the court to revoke the bond of the defendant based on harassment, threats, physical violence, or intimidation against the victim or victim's immediate family by or on behalf of the defendant. (A.R.S. § 13-4432).

**r. Victim's right to refuse an interview**

The victim shall not be forced to submit to an interview by the defendant, her/his attorney or her/his agent. If the victim consents, the victim can stop the interview at any time, and the prosecutor can protect her/his rights. (A.R.S. § 13-4433).

**s. Victim's right to privacy**

The victim need not testify regarding the victim's address, telephone number, place of employment, or other locating information. (A.R.S. § 13-4434).

**t. Speedy trial**

If there is a continuance, the victim can voice her/his views and her/his right to a speedy trial. If a continuance is granted, the court shall state on the record the reason for the continuance.

**u. Effect of failure to comply**

Failure of the state to perform a duty is not a reason to seek to set aside a conviction or sentence. Prior to discharge from a sentence, failure of the state to comply regarding a post-conviction release is a ground for the victim to seek to set aside the post-conviction release until the victim is given the opportunity to be heard. (A.R.S. § 13-4436).

**v. Standing to invoke rights; damages**

The victim can bring a legal action if a right is denied. The victim must pay for her/his own attorney but can recover damages from the governmental entity responsible for the intentional, knowing, or grossly negligent violation of the victim's rights. (A.R.S. § 13-4437).

**F. Victim Advocate**

The role of the crime victim advocate is legally recognized by statute. A.R.S. § 13-4401(5) defines a "crime victim advocate" as a person "who is employed or authorized by a public entity or a private entity that receives public funding primarily to provide counseling, treatment or other supportive assistance to crime victims." The definition and the communication status in section 5 above are clear. The ability of the crime victim advocate to address the court is not quite so clear. Arizona Rules of Evidence (A.R.E.) Rule 615(3) regarding the inability of the court to exclude a "person whose presence is shown by a party to be essential to the presentation of the party's cause" allows an advocate to be present. (*See also*: A.R.Cr.P., Rule 39(B)(9)). It is safe to say that the position of judges on allowing advocates to address the court is not clear. Each individual judge has the discretion to allow the advocate to address the court. This may be more appropriate at the initial release hearing than at the time of trial. The position of judges on allowing advocates to address the court is not clear, but the better practice would be to consider such testimony.

**G. Ethics Issues**

Although, a judge must always maintain the neutral and impartial role of her/his position, that role does not prevent the exercise of victim's rights as prescribed by A.R.S. § 13-4401, *et. seq.* Similarly, judges have a duty to understand the dynamics of and laws concerning domestic violence in the same manner as judges understand DUI and other topics.

**H. Court Safety**

At all stages of proceedings involving protection orders, judicial officers and court personnel shall maintain appropriate security for the parties and themselves.

## **1. A.R.S. § 13-4431**

The courts “shall, before, during and immediately after any court proceeding, provide appropriate safeguards to minimize the contact that occurs between the victim, the victim’s immediate family and the victim’s witnesses and the defendant, the defendant’s immediate family and defense witnesses.”

- a. Following a hearing, it may be prudent to direct the defendant to remain in court for a short period of time after the plaintiff is excused.
- b. If there is a concern for the safety of the parties, a judicial officer may request that a law enforcement officer be present in the courtroom during the hearing or to escort a party.

## **2. Fairness, Respect, and Dignity**

The victim, both constitutionally (Art. 2 § 2.1). and by A.R.Cr.P. Rule 39(b)(1)., has the right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse throughout the criminal justice process.

## **I. Other Victim Issues**

Other constitutional and statutory provisions also specify the rights of victims. These provisions are found in the following documents:

- 1. Victim Bill of Rights: Arizona Constitution Article 2, Section 2.1.**
- 2. Crime Victim Rights: A.R.S. § 13-4401 *et seq.***
- 3. Juvenile Offenses: A.R.S. § 8-382.**

Contracts with the accused with respect to re-enactment of a crime by movie, book, etc. (establishment of crime account A.R.S. § 13-4202(A)), are contrary to public policy and void.

## **J. Death Penalty Cases**

In Death penalty cases the victim has the right to address the court at time of sentencing. The victim shall not be treated as a witness and cannot be cross-examined as a witness regarding request for restitution. Because there is often a restitution hearing conducted at the time of sentencing, the judge will have to separate the two hearings. Otherwise, the judge cannot ask the victim about the basis for the restitution costs.

The case that holds that the family members of a victim cannot recommend a specific sentence to the jury on behalf of the victim is *Lynn v. Reinstein*, 205 Ariz. 186, 68 P3d 412 (2003).

A.R.S. § 13-703.01(R) became effective on October 1, 2003. It is unknown how this statute will impact *Lynn, supra* and whether or not the statute is limited to death penalty.

## **K. How Judges Can Help**

The judge's demeanor demonstrates concern about the victim's circumstances and the underlying events. The judge should recognize that the victim may be overwhelmed by the proceedings and unable to follow through with corrective steps the court might order.

### **1. Helpful Approach**

- a. The judge must listen carefully and determine who the victim is.
- b. Remember that the initial step toward stopping the abuse is being able to identify it as such. Denial, rationalization and minimization are coping methods by the abused person and those closest to the victim. The court must take whatever steps are necessary to ensure that the victim finds safety; the judge should consider all the resources available to provide comfort and safety and refer the victim accordingly.
- c. The victim must trust the judge. One of the effects of battering is that the victim's sense of trust has been so eroded, that he or she can no longer perceive neutrality. To the victim accustomed to living in an environment where a mistake in judgment could be lethal, there is little room for poor judgment in the courtroom. The court must take a proactive approach so that the victim trusts the court and the judicial system. Where jurisdiction permits and funding allows, appoint an understanding lawyer to represent the victim and explain the options.
- d. While a victim may understand the legal issues intellectually, he or she might be experiencing oscillating emotions and comprehension of the available options might become difficult. A judge shall take time to explain the options available and to solicit sufficient feedback from the victim to insure that there is sufficient comprehension.
- e. A victim may not want to make trouble and may appear very complacent in the courtroom even when he or she disagrees with what is taking place. A judge needs to take the time to ask for specific details. A victim may tend to accept responsibility for things that are not his or her fault, out of fear of further abuse. Frequently, a victim will accept inaccuracies in the record for similar reasons. A judge must make sure the court record is clear and complete. This may include affording the victim the opportunity to state any objections without fear and, if necessary, without the batterer being present. All judges must take great care to prevent dangerous or unfair settlements, especially when superior court judges craft custody and visitation orders.

## **2. Zero Tolerance of Violence**

The atmosphere in the courtroom must be free of intimidation. It is easy to forget that the victim may have been exposed to years of intimidation. A judge can use his or her authority to the fullest extent of the law and enforce every relevant law in the case. They can also create a courtroom ambience that promotes zero tolerance of domestic violence. For example, a judge can instruct bailiffs not to permit the litigants and related family members or friends to interact in an obtrusive manner during court recess. These loud family visits may be manipulative, coercive and inappropriate. A defendant will sometimes behave in a jovial manner or make vulgar comments about the victim during courtroom recess. Allowing this to happen might send a message of defiance to both the court and victim and make it appear that the defendant is immune to the court's authority.

## **Chapter VII**

### **Initial Appearance**

A.R.S. § 13-3601 (B) requires that where infliction of physical injury, or use of or threatening with a firearm or a dangerous instrument is involved, the defendant must be arrested unless the law enforcement officer believes that the victim will be protected from further injury. The release procedures of A.R.S. §§ 13-3883 and 13-3903 do not apply. The first statute deemed inapplicable provides that a person can be given a citation in lieu of detention. In domestic violence cases, a “long form complaint” is required to be filed. The issue of whether a complaint is fatally flawed because it was initialed on the Arizona Uniform Traffic citation has never been addressed. The second inapplicable statute refers to a person’s ability to post bond for release from jail pursuant to a “bail schedule” without seeing a judge. In domestic violence cases, the defendant must always have an initial appearance conducted by a judicial officer prior to release. The intent is that the judicial officer will place restrictions on the defendant’s conduct for the protection of the victim.

#### **A. Riverside vs. McLaughlin**

In Gerstein v. Pugh, 420 U.S. § 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the United States Supreme Court held that the Fourth Amendment requires a prompt determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. The case of Riverside v. McLaughlin, 500 U.S. § 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), defined what is meant by the word “prompt.”

At the initial appearance of any person where there is no complaint filed, the judicial officer must make a finding of probable cause in order to require the defendant to post a bond. The case of Riverside v. McLaughlin, 500 U.S. § 44 (1991), held where an arrested individual does not receive a probable cause determination within 48 hours or if a complaint is not filed, that person must be released. For most jurisdictions to make this determination within 48 hours of arrest, the finding must occur at the initial appearance. Judicial officers can rely on the release questionnaire prepared by law enforcement or any other documentation presented by the law enforcement agency.

This review of paperwork prepared by the law enforcement agency is not to be confused with the reading of a department report. That process was specifically prohibited in the Ethics Opinion No. 97-11 (**Appendix C**). Note that a clarification of this ethics opinion held that it was not unethical for a judge to refer to a police report at the initial appearance or arraignment stage for the limited purpose of supplementing the release questionnaire and for determining conditions of release, amount of bail, and appointment of counsel). Ethics Opinion, 99-3 (**Appendix D**).

#### **B. Conflict of Interest: Same Judge**

Questions have been raised as to whether the same judge should hear from a victim for input on release conditions and then preside over a trial. In addition, questions have been raised as to whether the same judge who granted an *ex parte* protective order should preside over the

hearing or a criminal trial involving the same parties. Frequently, judges are asked to rely on the information presented at a proceeding and to disregard information that they may have obtained about the parties in another proceeding. Especially in one-judge courts or smaller jurisdictions, it is not feasible to have another judge hear all future matters.

When dealing with probation revocation proceedings, the A.R.Cr.P. state that the arraignment and hearing can be held in front of the issuing judge or the assigned judge. (A.R.Cr.P., Rule 27.7(a)(1)).

## **Chapter VIII**

### **Release Conditions/Orders**

#### **A. Philosophy**

An initial appearance or initial appearance/ arraignment in a domestic violence case is very similar to one in any criminal case. While the setting of bond and release conditions in all cases deserves the best efforts of the judge, these matters are especially critical in domestic violence cases because of the volatility and danger inherent in domestic violence offenses.

Release conditions in general are set to reasonably assure the defendant's appearance at future court dates. (A.R.Cr.P. Rules 7.2(a) and 7.3). The purpose of release conditions in domestic violence cases has been expanded by statute. A.R.S. § 13-3601(I) requires that "[a]ny order for release, with or without an appearance bond, shall include pretrial release conditions necessary to provide for the protection of the alleged victim and other specifically designated persons and may provide for additional conditions which the court deems appropriate, including participation in any counseling programs available to the defendant."

#### **B. No Bond Until Seen by the Judge**

A judge sees a defendant in jail for an initial appearance and perhaps a combined initial appearance and arraignment when a defendant has been arrested on a domestic violence offense. According to A.R.S. § 13-3601(B), if the officer has probable cause to believe a domestic violence crime was committed and the defendant committed it, "[I]n cases involving the infliction of physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, the peace officer shall arrest." For other domestic violence offenses, the officer may arrest. For a domestic violence misdemeanor offense, whether the offense was committed in the presence of the officer is irrelevant. Also according to A.R.S. § 13-3601(B), the release procedures of A.R.S. §§ 13-3883(A)(4) and 13-3903, which allow misdemeanor defendants to bond out without seeing a judge or be cited and released, do not apply to defendants arrested on misdemeanor domestic violence offenses.

#### **C. Release on Arrest**

1. A person arrested for the commission of an act of domestic violence or for disobeying or revisiting an OP/IAH may not be released until an initial appearance is held. (A.R.S. §§ 13-3601(B), 13-3602(M) and 12-1809(L)).

Law Enforcement Note: The use of citation field release procedures under A.R.S. § 13-3903 is not applicable to arrests made for the commission of an act of domestic violence (A.R.S. § 13-3601(B)) or for disobeying or resisting an OP or IAH (A.R.S. §§ 13-3602(M) and 12-1809(L)).

2. The order of release, with or without an appearance bond, shall include pretrial release conditions necessary to provide for the protection of the alleged victim and other specifically designated persons. The order for release also may provide for additional condition that the Judicial Officer deems appropriate, including participation in counseling programs. (A.R.S. §§ 12-1809(L), 13-3601(I) and 13-3602(N)).
3. If the person is arrested or charged with a domestic violence offense, the court is required to ensure that the defendant is fingerprinted (10 print) and a Disposition Report is prepared for reporting the case to the Department of Public Safety (DPS).

The reports are generated at the jail upon the arrest of the defendant and the court must be sure the Disposition Report is received, placed in the file, and then completed and mailed to DPS at the conclusion of the case. If law enforcement improperly cited and released instead of arresting the defendant, the court must require that the defendant be fingerprinted (10 print) so the Disposition Report is generated. (A.R.S. § 41-1750 and A.R.Cr.P 4.2(a)(8)).

At the initial appearance or on the arraignment of a summoned defendant who is charged with a felony offense, a violation of Title 13, Chapter 14 or Title 28, Chapter 4 or a domestic violence offense as defined in A.R.S. § 13-3601, the court shall order that the defendant be fingerprinted at a designated time and place by the appropriate law enforcement agency if the court has reasonable cause to believe that the defendant was not previously fingerprinted.

## **D. Victim's Input**

The victim has a constitutional and statutory right to be heard regarding conditions of release. (Arizona Constitution, Article 2.1(A)(4); A.R.S. § 13-4422). Also by statute, the victim's right to be heard may be exercised, at the victim's discretion, through an oral statement, submission of a written statement, or submission of a statement by audio or videotape. (A.R.S. § 13-4428(B)). If the victim is in custody for an offense, the victim may be heard by written statement. (A.R.S. § 13-4428(C)).

Judges must exercise discretion in hearing the victim's input. Make sure the victim knows defense counsel has different ways to handle victim input and confrontation. It is never appropriate for a judge to challenge the victim's lifestyle choices or to embarrass a victim after hearing a victim's input.

In counties with less than 150,000 persons, the court must forward, within twenty-four hours after a defendant is arrested for an act of domestic violence, a certified copy of the Release Order (RO) to the sheriff of the county in which the order was issued.

A.R.S. § 13-3624(B) requires that the court notify the sheriff's office of material changes in the release order, if the conditions of the RO are no longer in effect and when the charges are resolved.

**1. Factors to Consider in Deciding Conditions of Release**

- a. To reasonably assure defendant's future appearance.
- b. Consider failures to appear on this case or on other cases.
- c. Consider ties or lack of ties to the community.
- d. Consider if defendant tried to flee during arrest.

**2. To Provide For The Protection of the Victim and Others**

- a. Consider the danger to the victim and others. (A.R.S. § 13-3601(I)).
- b. Consider victim's input. A.R.C.P. Rule 4.2(a)(6) requires that the judge "consider any views and comments offered by the victim concerning the issue of release."
- c. Consider whether the defendant is a threat to society.

**E. Setting Conditions of Release**

Whether a defendant pleads guilty or not guilty to a domestic violence offense, there will be a future court date; therefore, the judge must set conditions of release. The information available for making decisions about the conditions of release will vary from case to case. The judge should consider all available information in making this very important decision. In every case a Form IV should be available, which consists of two parts. Part One is filled out by police and Part Two is the defendant's release questionnaire. In some cases, the police report will also be available. A prosecutor may be present and may have a statement on the conditions of release. A victim may be present and may wish to make a statement on the conditions of release.

**1. Conditions of Release**

There are two principal parts to Conditions of Release. The first is the amount of bond, if any, that a person must post to be released and the second is other conditions that the judge deems reasonably necessary to assure the defendant's appearance and to provide for the protection of the victim and others.

The release conditions must be in writing.

**2. Bond Considerations**

A.R.Cr.P. Rule 7.2(a) requires that a person charged with an offense that is bailable as a matter of right, shall be released on the person's own recognizance, unless the judge determines that such a release will not reasonably assure the person's

appearance. The prosecutor must prove issues of release conditions prior to conviction by a preponderance of the evidence. (A.R.Cr.P. Rule 7.2(c)).

You must put a check on the Own Recognizance (OR) release or bond amount line of the Determination of Release Conditions and Release Order Form. You can decide whether the bond should be cash or security on an original charge. Please document the bond as “cash” if that is your decision. The presumption is that the bond can be cash or security. Do not write “cash only” because then the jailers will not accept credit card payments.

## **F. Other Conditions of Release**

In addition to deciding whether bond should be posted and in what amount, consider whether other release conditions would be appropriate. Even if bond is required, many defendants will bond out, and in DV cases, additional conditions of release shall be considered.

### **1. A.R.S. § 13-1601(I)**

By statute the judge shall include pretrial release conditions necessary to provide for the protection of the alleged victim and other specifically designated persons and may provide for additional conditions which the court deems appropriate, including participation in any counseling programs available to the defendant.

### **2. Counseling**

A.R.S. § 13-3601(I) permits the judge to order counseling as a condition of release. Many judges feel, however, that counseling is more appropriately a sentencing condition and that setting counseling as a condition of release violates the presumption of innocence (a person is presumed innocent until proven guilty beyond a reasonable doubt). Ordering counseling as a condition of release presumes that the defendant is guilty.

### **3. Firearms**

If there is a finding that the defendant is a credible threat to the plaintiff or specifically designated person, the court may prohibit the defendant from possessing or purchasing a firearm.

- a. If the defendant is prohibited from possessing a firearm, the court shall order the defendant to transfer any firearm owned or possessed by the defendant to the appropriate law enforcement agency within 24 of release.
- b. Credible threat is not limited to the uses of a firearm, but also extends to the threatened use of a firearm and other actions which place the plaintiff or other specifically designated persons in fear of bodily harm or death.

**4. Some Considerations:**

- a. Consider not allowing the defendant to return to the home except once with a police officer to obtain personal belongings.
- b. If the defendant does not live at the site of the alleged crime, consider requiring that the defendant not return to the scene of the alleged crime.
- c. Require that there be no contact with the victim.
- d. Consider requiring that the defendant not possess or purchase firearms and that the defendant turns any firearms over to the law enforcement agency where the defendant resides.
- e. If alcohol consumption appears to be an issue, consider ordering that the defendant not consume alcoholic beverages.
- f. If the defendant is being ordered to not return home except to obtain personal belongings, consider requiring that the defendant provide the court with proof of current local address within 24 or 48 hours of release.

**5. Check the boxes in front of the release conditions that you impose in a particular case.**

**6. The release conditions must be in writing.**

**G. Modification of Release Condition Orders**

A judge will sometimes be asked to modify conditions of release prior to the final resolution of the case. The defendant can move for modification of the conditions or a victim may ask that the conditions be modified.

- 1. Photo identification of the victim should be checked.**
- 2. The prosecutor and victim must be notified of the request and be given an opportunity to be heard on the request.**

**H. Release Conditions Conflicting With Protective Orders**

In many domestic violence cases there is a protective order that has been previously granted and is in effect at the same time that the release conditions are being set. You may or may not know about the earlier protective order. If you know about the protective order, you probably will not have a copy of the order. Advise the defendant that her/his conduct may be the subject of multiple court orders and that the conditions of release do not modify other court orders.

## Chapter IX

### Counsel

In Arizona, every person charged in a criminal proceeding is guaranteed the right to the effective assistance of counsel. This right is provided in the Arizona Constitution, Article 2, Section 4 (the “due process” clause), and Article 2, Section 24. The United States Constitution also guarantees this right in the Fifth and Sixth amendments. Arizona’s right to counsel is incorporated into A.R.Cr.P. Rule 6.1 (a) which reads:

A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or the attorney’s agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow preparation therefore.

The right to counsel is a personal right, and the defendant must choose whether or not to exercise that right. Someone else cannot invoke the right in his or her behalf. See State v. Transon, 212 Ariz. Adv. Rep. 26 (App. March 12, 1996); Moran v. Burbine, 475 U.S. 41, 106 S. Ct. 2183, 65 L.Ed.2d 1 (1972). Rule 6.1 (c) does allow the judge to appoint advisory counsel to the defendant who is a *pro se* litigant. See State v. Delvecchio, 110 Ariz. 396, 519 P.2d 1137 (1974). A defendant who is dissatisfied with appointed counsel may request that the court appoint a different lawyer, but the defendant may not choose a particular lawyer to be appointed. State v. Thorne, 104 Ariz. 392, 453 P.2d 963 (1969).

#### A. Appointment of Counsel

The court should address defendant’s right to counsel at the initial appearance. If a defendant is indigent, s/he may qualify for a court appointed attorney. The court should review the charge to determine if the imposition of jail is a possibility should the defendant be found guilty. In most domestic violence offenses, jail is a distinct possibility; therefore, it is prudent for the judge to appoint counsel. The court should then place the defendant under oath, and review the defendant’s financial affidavit to determine if s/he is indigent. If the defendant does not desire to have counsel appointed, the court should provide her/him with the necessary waiver forms to fill out.

The appointment of counsel in misdemeanor cases is limited to cases where the defendant may actually be sentenced to a jail term. Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed2d 383 (1979). No jail term may be imposed for defendants who are not represented by counsel, unless they have intelligently and voluntarily waived the right to counsel. See Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1972); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The court should inquire of the unrepresented defendant prior to trial whether s/he is waiving the right to counsel, and a record should be made of the waiver. A waiver of counsel form 1) must be signed by the

defendant in writing, and 2) the JO must find that the defendant knowingly, intelligently, and voluntarily waived the right to counsel.

The right to counsel may be invoked at any time in the proceedings, even post-conviction. Thus a defendant may enter a plea, and later request an attorney for the sentencing, for a probation revocation proceeding, or for an appeal.

## **B. Victim's Counsel**

Victims also have the right to engage and be represented by personal counsel in criminal cases. (*See* A.R.Cr.P., Rule 39(c)(4)). The rule is silent as to whether the court may appoint counsel to an indigent victim. The rule implies that a victim that desires to be represented by counsel must pay any fees associated with such representation. A.R.S. § 13-4437(A) supports this interpretation. This statute reads: "In asserting any right, the victim has the right to be represented by personal counsel at the victim's expense." A limited exception to this general rule is afforded in A.R.S. § 13-4403(B), which gives the court power to appoint a lawful representative who is not a witness to act in the victim's behalf if the victim is, "incompetent, deceased or otherwise incapable of designating another person to act in the victim's place." Although not stated, the implication is that the cost of appointing such a lawful representative could be a public expense. The appointment in this situation is not limited to counsel.

It is interesting to note that although victims are provided the right to counsel, the rules of procedure do not indicate how the courts are to integrate the victim's counsel into case proceedings. This is left to the discretion of each judge given the particular circumstances of the case.

The right to the assistance of counsel is a fundamental right under the constitution. A violation of this right could result in the overturning of a conviction on appeal, the suppression of evidence, or the dismissal of a criminal charge.

## **Chapter X**

### **Discovery**

#### **A. Victim Interview**

##### **1. A.R.S. § 13-4433**

This statute gives the victim the right to refuse any interview by the defendant. It also provides a variety of other rights such as:

- a. The defendant must contact the victim through the prosecutor's office.
- b. If the victim consents to an interview, the victim may choose the place and mandate certain conditions.
- c. During the interview, the victim can terminate it or refuse to answer certain questions.
- d. The prosecutor may attend any interviews as may the victim's attorney, if s/he has one.
- e. This does not apply to peace officers.

##### **2. A.R.S. § 13-4430**

This establishes confidentiality between crime victim advocates and victims. The only information that can be disclosed is compensation or restitution information (Section A), perjured testimony or exculpatory material (information likely to show the innocence of the accused)(Section C). The court shall hold a hearing *in camera* (private) to determine if the material is exculpatory (Section D).

#### **B. Confidentiality of Advocate and Victim**

The issue of the exact rights and duties of a domestic violence program regarding confidentiality of client information has often arisen in the context of law enforcement, court proceedings, provision of benefits and health care treatment.

Consultation between a crime victim advocate and victim is also privileged information. (A.R.S. § 13-4430). A crime victim advocate means a person who is employed or authorized by a public entity or a private entity that receives public funding primarily to provide counseling, treatment or other supportive assistance to crime victims (A.R.S. § 13-4401). An advocate shall not disclose as a witness or otherwise any communication except compensation or restitution information unless the victim consents. The privilege does not apply if the victim will give or has given perjured testimony or if the communication contains exculpatory material. The court must hold an *in camera* hearing to determine if the

material is exculpatory. If, with the victim's consent, the advocate discloses the material to the prosecutor or a law enforcement agency, the advocate must also disclose such information to the defense attorney if such information is otherwise discoverable, i.e., compensation or restitution information or exculpatory material. If the advocate works for a prosecutor's office, information can be disclosed with oral consent of the victim.

## **1. Testimonial Provisions**

Arizona has established a whole host of privileges that prohibit testimony in legal actions: husband/wife (A.R.S. § 12-2231) except for divorce, a criminal action, or alienation of affection (A.R.S. § 12-2232); clergy or priest/penitent (A.R.S. § 12-2233); attorney/client (A.R.S. § 12-2234), which includes those working for an attorney; doctor/patient (A.R.S. § 12-2235); and reporter/informant (A.R.S. § 12-2237), which also applies to criminal actions.

## **2. Privilege Extension**

The testimonial privilege is also extended to a licensed psychologist. (A.R.S. § 32-2085). Information discussed during mediation conducted by a neutral third party, except for actual or threatened violence, is confidential. (A.R.S. § 12-2238). The purpose for confidentiality is to encourage communication, which is the same reason shelter files are confidential.

## **3. Confidentiality Laws**

In addition to victims' rights law, various other federal and state laws apply. See Confidentiality for Domestic Violence Service Providers under Federal and State Law by AzCADV.

- a. Shelters that receive funding under the Domestic Violence Shelter Fund (A.R.S. § 36-3002) are required to maintain the confidentiality of any information that would identify persons served by the shelter. (A.R.S. § 36-3005(A)(3)). Those that do not receive such funding come under other sections described in Confidentiality for Domestic Violence Service Providers under Federal and State Law by AzCADV. The location of a shelter is confidential and may not be disclosed (A.R.S. § 36-3009). It is even more important to protect the confidentiality of those in the shelter than to protect the location of the shelter itself.
- b. Arizona has also established a procedure for those working with victims of crime to become certified, and thus be granted confidentiality rights under its statutes.
- c. In any legal action, a certified behavioral health professional shall not be questioned regarding any communications made by that client nor divulge

any information obtained by the professional without the consent of the client. (A.R.S. § 32-3283 *et seq.*).

- d. The files of programs that receive funding from Department of Health Services are confidential as well. Clinical records maintained as a result of services authorized by the Arizona Department of Health Services (DHS) are confidential. (A.R.S. § 36-160). Almost all domestic violence programs receive money from DHS. DHS is able to keep patient records, including clinical records, confidential. (A.R.S. § 6-404). It then follows that the original service provider must be able to keep clinical records confidential. There would be no reason for DHS to keep a record private, unless service providers are able to keep the same record confidential.
- e. If a shelter receives federal monies under Substance Abuse Among Government and other Employees (42 U.S.C. 290 dd-2), or Public Health Services, (Alcohol and Drugs 42 U.S.C. 290 ee-3), their records are confidential and can be released only after a good cause hearing in which a four-part test weighs the public interest against injury to the patient, injury to the physician-patient relationship, and injury to the treatment goals. Otherwise, there is no release required for victim medical records. (c.f. . Benton v. Superior Court in and for County of Navajo, 182 Ariz. 466, 897 P.2d 1352 (App. 1995), *rev. denied*).
- f. If a shelter receives federal money under Justice System Improvement (42 U.S.C. 3789(g)), Family Violence Services and Prevention Act (42 U.S.C. 10401 *et seq.*), Crime Victim Fund (42 U.S.C. 10601 *et seq.*), Housing Assistance, Emergency Shelter Grant (42 U.S.C. 11375 (c)(5)), or Violence Against Women Act (42 U.S.C. 13942), their records are immune from process.

## **Chapter XI**

### **Evidence**

#### **A. General**

The use of physical evidence interjects an unparalleled "human quality" into domestic violence cases. Hearing a child describe to a 9-1-1 operator how her/his mother is being hit, kicked and strangled brings home the horror caused by domestic violence more effectively than the routine testimony of an officer stating that s/he responded to a 9-1-1 call. Similarly, looking at an aluminum bat that was held over the victim's head while the offender threatened to kill him/her will graphically illustrate the serious nature and potential lethality of misdemeanor domestic violence offenses.

#### **B. Real Evidence**

Police impound real evidence (*e.g.*, a belt, a bat, a knife, etc.) that will be of importance in the presentation of the case. In order to admit the real evidence, a witness with knowledge must authenticate the item by testifying that the item is what s/he purports it to be. (A.R.E., Rule 901(a)). The evidence must also be relevant to the case. (A.R.E., Rule 401).

For example, a victim who was beaten with a lamp cord would be the foundational witness for the cord that the police officer impounded at the time of the beating. The victim must testify that the cord brought to court is the same cord used during the assault. That can be done by other witnesses who saw the assault for example. "Such proof need not be conclusive; circumstantial evidence suggesting the probability" that the item in court was the item used is sufficient. (A.R.E., Rule 101 (3d ed. 1991)). In the example, the cord would be relevant to show with what the victim was beaten and would substantiate the type of injury sustained.

#### **C. Photographs**

Evidence such as photographs realistically portrays the injuries suffered by a victim, witness, defendant or the damage inflicted upon property. When responding to a call, police officers are supposed to take photographs of victims' injuries, broken household items, or upset children. Victims and defendants themselves often take photographs of injuries several days later when bruising becomes more pronounced.

##### **1. Admissibility**

Photographs are defined in A.R.E., Rule 1001(2), as including "still photographs, x-ray films, video tapes, and motion pictures." Trial courts have broad discretion as to whether to admit photographs in criminal trials. State v. Salazar, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992), *cert. denied*, 509 U.S. 912, 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993). The courts have adopted a three-part inquiry to govern the admissibility of photographs:

- a. Relevance;
- b. Tendency to incite or inflame the jury; and
- c. Probative value versus potential to cause unfair prejudice.

State v. Roscoe, 184 Ariz. 484, 494, 910 P.2d 635, 636 (1996), *cert. denied*, 519 U.S. 854, 117 S.Ct. 150, 136 L.Ed.2d 96 (1996).

## **2. Tendency to Incite or Inflame**

Once relevancy has been established, the court must determine if the photograph is inflammatory and, if so, whether the danger of unfair prejudice from admitting the photograph is *substantially* outweighed by the probative value. *Id.*; A.R.E., Rule 403.

Domestic violence photographs will often depict bruising, cuts, scrapes or black eyes. These photographs are typically not of such a gruesome matter as to inflame the court. *See generally*, State v. Roscoe, *supra* (Photographs of a nude seven-year-old murder/rape victim were admissible because each photo was relevant and the probative value outweighed any prejudice); State v. Salazar, *supra* (photograph of an 83-year-old female strangulation victim with a phone cord still wrapped around her neck was not unfairly prejudicial).

## **D. Tape Recordings**

Police departments record all 9-1-1 calls received. These tape-recorded telephone conversations from victims and witnesses, which often occur during or immediately following the crime, can be compelling evidence. Additionally, some officers tape record interviews with victims, suspects and witnesses in domestic violence investigations.

### **1. Admissibility**

A copy of any tape to be used for prosecution must be disclosed to the defense pursuant to A.R.Cr.P. Rule 15.1.

### **2. 9-1-1 Tapes**

A.R.S. § 13-3989.01 specifically addresses the admissibility requirements for 9-1-1 tapes and provides:

The records and recordings of 911 emergency service telephone calls are admissible in evidence in any action without testimony from a custodian of records if the following form accompanies the records and recordings:

The accompanying records and recordings and explanatory material are from the (name of agency) public safety answering point communications facility. This form authenticates (number) pages. The form authenticates (number) tapes. These documents and tapes pertain to: case number \_\_\_\_\_, department report number \_\_\_\_\_, call receipt date and time \_\_\_\_\_, caller name \_\_\_\_\_, call origination location address \_\_\_\_\_, originating telephone number \_\_\_\_\_, dispatch time \_\_\_\_\_, arrival time \_\_\_\_\_. Signed: custodian of records.

The recordings are deemed to be authenticated pursuant to A.R.E., Rule 901(b)(10). (A.R.S. § 13-3989.01(B)). Thus, the proponent must review the tape, records, and accompanying form to determine if they meet the statutory requirements. To save time, the state and defense can stipulate to the admission of the tape. If no stipulation is reached, the proponent must lay the appropriate foundation.

### **3. Foundation**

A.R.S. § 13-3989.01 alleviates the need to call a custodian of records to meet the foundational requirement necessary for admissibility. However, the proponent must still demonstrate relevance and establish a hearsay exception in order to admit the contents of the tape during trial. Tape recordings that do not contain 9-1-1 conversations are admitted pursuant to the rules of evidence. Chain of custody issues do not exist with tape recordings because identification can easily be established. Anyone who was present when the tape recording was made can testify that the audiotape accurately reflects the sounds recorded. (A.R.E., Rule 901(b)(1)).

If no witness was present when the tape recording was made, there must be evidence that provides appropriate foundation. For example, domestic violence victims occasionally provide answering machine tapes containing threats. In such cases, someone will need to testify about how the tape was made (*e.g.*, it was recorded on the answering machine on the victim's telephone). Someone would also need to identify the voice of the person on the tape. An opinion by a witness who had knowledge of the voice is sufficient. (A.R.E., Rule 901(b)(5)). The victim usually can identify the defendant's voice.

In a domestic violence case, the defendant, witnesses and victim could all have prior convictions that would be admissible for impeachment purposes pursuant to Rule 609.

## **E. Cyber Stalking**

These cases provide several new challenges for the court. Cases which are tried before a jury will require the addition of hi-tech *voir dire* questions to the standard array of questions.

These cases also present several different types of evidentiary issues. As with other types of stalking and harassment cases, a series of circumstantial evidence is used to present these cases to the jury or the court. Evidence you may see in these types of cases includes copies of E-mail messages. These may include printouts for either the victim's or the defendant's computer. Such message will usually have the URL at the top of the message. The numbers on the top are significant as they are able to tie the message to the computer, which has the account that sent the message. E-mail logs may be presented to demonstrate the E-mail traffic to the victim's computer. Information regarding the server or E-mail account used by the defendant may be presented. Testimony from AOL, Yahoo, MSN, or other Internet Service Provider's (ISP) representatives may be presented with regards to the defendant's E-mail, use of web sites, or use of chat rooms. Additionally, screen captures may be presented. These are actual segments of the harassment that was occurring in a chat room or web site, which have been captured/copied by computer software. Such captures may be presented via the use of a computer in court. Testimony which may be heard in these types of cases includes testimony from not only the victim, but also the forensic examiner/analyst who reviewed the computer information, the Internet Service Provider (ISP) Custodian, and the investigator.

## **F. Medical Records**

Unless otherwise provided, all medical records are privileged and confidential (A.R.S. § 12-2292) and shall not be released even to the patient, if the physician or psychologist determines that such release would be harmful to the patient (A.R.S. § 12-2293). But either party can seek the production of the medical records of the victim or defendant through subpoena or more likely, court order. Medical records are beneficial where the state cannot locate a victim or the victim moves out of state and will not return for trial. Both sides might want to obtain medical records for the defendant/victim to attack or support a claim of self-defense.

### **1. Victim's Records**

The state can subpoena victim medical records even when the victim is uncooperative. Neither the Victims' Bill of Rights nor the statutory physician-patient privilege protects medical records of victims in domestic violence cases. Benton v. Superior Court in and for County of Navajo, 182 Ariz. 466, 897 P.2d 1352 (App. 1995), *rev. denied*.

The Arizona Court of Appeals in Benton v. Superior Court in and for County of Navajo found that the Victims' Bill of Rights did not create a right of privacy to allow the victim to impede a criminal prosecution. Accordingly, its provisions do not protect the victim's medical records. *Id.*

In addressing the physician-patient privilege, the court acknowledged that a domestic violence victim might not cooperate with prosecution for reasons such as fear, dependence or a desire for reconciliation. It analyzed the victim's desire for privacy motivated by such reasons with the state's interest in prosecuting criminals. It found

“the public's interest in protecting victims outweighs the privacy interest reflected in the physician-patient privilege.” *Id.* at 468, 897 P.2d at 1354.

Either party can request a *subpoena duces tecum* to the health care provider. In some cases, a court order compelling the production of the victim's medical records may be necessary. The procedures of A.R.S. § 12-2281 *et seq.* should be reviewed.

Because the records are being requested by a governmental entity and the records are otherwise subject to release based on the Benton v. Superior Court in and for County of Navajo case, the requirements of A.R.S. § 12-2282(A) and (B) do not apply. A.R.S. § 12-2282(C)(4). Of course, the medical records can be voluntarily provided to the state by the patient.

## **2. Admissibility**

When the records are provided, A.R.S. § 12-2283 requires them to be accompanied by an affidavit of the custodian or other qualified witness stating that:

- a. The affiant is the custodian of records and has the authority to certify the records.
- b. The copy is a true copy of the records.
- c. The records were prepared by the personnel of the health care provider or physicians, or persons acting under the control of either, in the ordinary course of business at or near the time of the act, condition, or event.
- d. If applicable, the health care provider is subject to the confidentiality requirements in 42 U.S.C. §§ 290 dd-3 and 290 ee-3, those requirements may apply to the records in question, and accordingly, a request for the court to determine the confidentiality is being made.

If the affidavit and records meet the requirements of A.R.S. § 12-2283 above, a copy of the medical records is admissible in evidence without the presence of a custodian of records under A.R.S. § 2-2284. The content of the records must meet a hearsay exception. Once admitted, the evidence contained within the records is presumed true at trial. A.R.S. § 12-2284.

Victims may report the cause and severity of injuries when seeking medical or psychological treatment in domestic violence cases. These statements will qualify for admissibility under A.R.E., Rule 803(4), (*But see* federal law above). The use of this exception in domestic violence cases may be limited, however. Statements that are not made in furtherance of treatment have been held to be inadmissible. State v. Allen, 157 Ariz. 165, 755 P.2d 1153 (1988) (because the victim's statements were made for purposes other than medical treatment, they were held inadmissible).

## **G. Physician-Patient Privilege**

A.R.S. §13-4062 provides several conditions that apply to physicians in regard to examination as a witness.

### **1. Examination Restrictions**

- a. Physician or surgeon, without consent of the physician's or surgeon's patient, as to any information acquired in attending the patient that was necessary to enable the physician or surgeon to prescribe or act for the patient.
- b. Privileged communication applies equally to medical records and communications from the patient to the physician. State v. Santeyan, 136 Ariz. 108, 664 P.2d 652 (1983).

### **2. For the Privilege to Apply**

- a. The patient must not consent to the testimony;
- b. The witness must be a doctor or surgeon;
- c. The information must have been imparted to the physician while s/he was attending the patient; and
- d. The information must be necessary for the treatment of the patient.

State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989); State v. Morales, 170 Ariz. 360, 824 P.2d 756 (App. 1991).

As discussed above, the physician-patient privilege does *not* apply in criminal prosecutions to victim medical information. Benton v. Superior Court in and for County of Navajo, 182 Ariz. 466, 897 P.2d 1352 (App. 1995), *rev. denied*. It has long been held that the physician-patient privilege does not apply to nurses. Southwest Metals Co. v. Gomez, 4 F.2d 215 (1925); 39 ALR 1416. Similarly, it does not apply to non-licensed psychologists who are not medical doctors. State v. Elmore, 174 Ariz. 480, 851 P.2d 105 (App. 1992), *rev. denied*; State v. Stotts, 144 Ariz. 72, 695 P.2d 1110 (1985); State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981). Because paramedics are not doctors, the physician/patient privilege does not apply to EMTs. State v. Cahoon, 59 Wash. App. 606, 799 P.2d 1191 (1990).

In State v. Huffman, 137 Ariz. 300, 670 P.2d 405 (App. 1983), the Arizona Court of Appeals held that A.R.S. § 13-4062(4) only applies to the examination of a doctor witness and does not apply to the examination of a police officer witness who overheard statements between the physician and the patient.

## **H. Proof for Violations of Orders of Protection**

Violations of orders of protection are charged under A.R.S. § 13-2810(A)(2) in addition to any other crimes which may have been committed during the violation of a protective order. These cases involve a defendant violating a term of a valid court order. Orders of protection in domestic violence situations expire one year from the date of service of process. (A.R.S. § 13-3602(K)).

It is important to carefully review the copy of the order of protection served on the defendant.

### **1. Particular Attention Should Be Paid to:**

- a. The date of service of the order, which is the effective date of the order;
- b. Whether the order is still in effect (*e.g.*, whether the order was quashed);
- c. The people protected;
- d. The locations covered; and
- e. The conduct prohibited.

The acts of the defendant must fall within the specific time limits and the prohibitions of the order. An affidavit of service must also be present to demonstrate the defendant's knowledge of the order.

Orders of protection are issued by a judicial officer. Therefore, charges may be filed and defendant arrested even if the person who obtained the order initiated the contact by the defendant. *See State v. Dejarlais*, 136 Wash.2d 939, 969 P.2d 90 (1998). This not only avoids the issue of whether the contact was voluntary, but also requires the defendant to be personally accountable to comply with lawful court orders.

### **2. Admissibility**

The order of protection and certificate of service are the basis for the prosecution of a violation of an order of protection. Rule 902(1) of Arizona Rules of Evidence provides the method by which orders of protection and certificates of service can be determined to be self-authenticating documents. This means these documents if properly certified can be admitted into evidence without the necessity of the custodian of records appearing in court.

The state must show that the defendant *knowingly* violated the court order. (A.R.S. § 13-2810(A)). Evidence that the order of protection was served on the defendant satisfies this element. Evidence of service includes any one of the following:

- a. The certified copy of the certificate or affidavit of service including the defendant's name, certification that the order was served on the defendant, and the signature of the person serving process (on the affidavit of service), or
- b. Testimony from the person who served the order, or
- c. Testimony from the victim or a witness who was present when the order was served on the defendant.

The person who served the order can be called as a witness and often can identify the defendant in court as the person who was served the order. If the process server is not able to identify the defendant, s/he should be able to testify to her/his practice of asking for identification of the person on whom s/he is serving the order. The process server can sometimes testify about statements made by the defendant when served with the order that are relevant and helpful to the prosecution of the case. The statements would be admissible as admissions by a party-opponent. (A.R.E., Rule 801(d)(2)).

### **3. Foundation**

A certified copy of the order of protection and affidavit of service is usually required to prosecute violations of the order.

The order of protection falls within the public records and reports exception to the hearsay rule. (A.R.E., Rule 803(8)). Certified court records are self-authenticating and admissible without the testimony of a witness pursuant to A.R.E., Rule 902(4).

### **4. Foreign Orders**

*See Full Faith and Credit (Chapter III).*

## **I. Conditions of Release**

Defendants who have violated their conditions of release on a pending crime can be charged with A.R.S. § 13-2810(A)(2). This offense can involve defendants released from custody on a domestic violence offense violating a condition of release, such as to “stay away from the victim.”

It is important to carefully review the copy of the release conditions served on the defendant. The release conditions should be reviewed for the pertinent information.

### **1. Pertinent Information**

- a. The date of service of the release conditions;

- b. Whether the conditions are still in effect (*e.g.*, whether the conditions have been modified);
- c. The people who are protected;
- d. The locations covered; and
- e. The conduct prohibited.

## **2. Signature**

The release conditions must contain the defendant's signature and the judge's signature. If the judge's signature is missing, the case could be factually sufficient if the Departmental Report indicates that the officer has examined the original copy of the release conditions and observed that the judge's signature or stamp was present.

## **J. Evidence Based Prosecution**

A person may be prosecuted without the testimony of the accuser. There is no absolute right to confrontation. The defendant may be prosecuted with corroborating evidence such as witness testimony, police testimony, expert testimony, police reports, medical records, photos, objects, and forensic evidence.

### **1. Application to Domestic Violence**

Many victims of domestic violence are reluctant to testify against the abuser. Neal A. Hudders, *Note: The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 Duke L.J. 1041, 1047 (2000). Victims may choose to refrain from testifying for the following reasons:

- a. A victim may be dissatisfied with the criminal justice system once [s/he] enters it. This dissatisfaction may arise because the victim is simply unprepared for the realities of the criminal justice process, or because court personnel make the victim feel personally responsible for [the] abuse.
- b. The victim may be subject to physical retaliation or intimidation by the offender.
- c. The cyclical nature of domestic abuse can result in a lull in abuse, during which a reconciliation may occur between the victim and the abuser and, given the positive current state of the relationship, the victim may become unwilling to testify.
- d. Many victims may partially or entirely attribute the cause of the abuse to their own conduct.

- e. The victim may use the threat of prosecution to gain control in an abusive relationship.

Hudders, *supra* at 1048-1049. If a victim does, in fact, testify, the victim is frequently an uncooperative witness. Hudders, *supra* at 1049. For example, “The victim may recant prior statements” or “A victim may not remember, or may claim not to remember, the abusive incident when testifying at trial.” Hudders, *supra* at 1049-50. Even when victims do testify, women are often not believed. Both judges and juries continue to discount or ignore victim’s testimony about the abuse. (Aiken *infra*)

Generally the abuser and victim are the only witnesses to the crime. Hudders, *supra* at 1044. However, eyewitness testimony is notoriously unreliable. That is why modern jurisdictions rely much more heavily on other types of evidence. When victim testimony is necessary to the conviction of an abuser, hearsay statements with corroborating evidence may be one way a victim’s “voice” is brought to trial. Hudders, *supra*.

## 2. **Rule 803** (*See both Arizona Rules of Evidence and Federal Rules of Evidence.*)

Rule 803 of the Rules of Evidence contains exceptions to the hearsay rules where the availability of the declarant to testify is irrelevant. Exceptions set forth in Rule 803, which are most often seen in domestic violence criminal cases, include present sense impression, excited utterance, and statements for the purpose of medical diagnosis or treatment. In addition to these there is also a catch all provision.

Statements that fall under the present sense impression exception are statements made that describe an event or condition while the declarant is perceiving the event or condition or immediately thereafter.

The excited utterance hearsay exception is probably the most frequently utilized exception in evidence-based prosecution. Excited utterances are those statements that relate to a startling event or condition made while the declarant was under the stress of the exciting event. The Arizona Supreme Court set forth a three-part test to determine if statements meet the standard to qualify as an excited utterance. First, there must be a startling event. Second, the statement must be made soon enough after the event so as not to give the declarant time to fabricate, and finally the statement must relate to the startling event.

It is important to remember that no specific time lengths are set forth. The statements need only be made at or close enough to the time of the event so that the declarant is still under the stress of the event. Furthermore, the court may listen to the statement itself in order to determine whether the statement falls under this exception.

Statements made for the purpose of medical diagnosis or treatment may be allowed into evidence under this rule. This may include statements made to paramedics, doctors, nurses, counselors, or psychologists when made in the course of treatment.

### **3. Waiver**

Orders of protection and injunctions against harassment are court orders against the defendant only. These forms specifically state that the victim may not change or modify the order.

The plaintiff (victim) cannot be convicted with violation of the order as the order only prohibits conduct by the defendant. Even if the plaintiff (victim) were to invite the defendant over, the plaintiff (victim) cannot be charged with A.R.S. § 13-2810 as it is only conduct by the defendant that is prohibited.

### **4. Rule of Law**

#### **a. Right of Confrontation is no Bar to use of Victim Statements**

The Sixth Amendment to the United States Constitution and Article II, § 4 of the Arizona Constitution “guarantee[s] a defendant the right to confront his [or her] accusers and witnesses at trial.” Arizona v. Riley, 196 Ariz. 40, 43, 992 P.2d 1135, 1138 (Ariz. Ct. App. 1999). The Confrontation Clause is based on the theory that juries will be better able to discern the truthfulness of statements through the testimony of witnesses. Riley, *supra*. However, the right to confront an accuser is not absolute. In 1992, the U.S. Supreme Court held that the Confrontation Clause does not require the prosecution to produce the victim of crime at the trial, nor does it require that the trial court find the victim unavailable in order for her/his out-of-court statements to be admissible. White v. Illinois, 502 U.S. 346, 351, 112 S.Ct. 736, 740 (1992). The most obvious example is a murder victim. Defendants are not able to confront murder victims, but the defendants may still be prosecuted with corroborating evidence. The Supreme Court has also held that a defendant cannot establish a violation of the Sixth Amendment just because s/he was deprived of some testimony or some discovery. S/he is not entitled to every shred of testimony. S/he has to make a plausible showing that the testimony or discovery would have been both material and favorable to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 1002 n. 15, 94 L.Ed. 2d 40 (1987).

#### **b. Hearsay statements**

Generally, hearsay statements, statements made outside the course of trial “offered in evidence to prove the truth of the matter asserted,” are not admissible. (Federal Rules of Evidence, Rule 801(c)). The hearsay rule proceeds upon the theory that “the demeanor of the witness” furnish[es] trial

and opponent with valuable clues.” (Federal Rules of Evidence, Rule 801 advisory committee’s note: introductory note to the hearsay problem.) Also, it is believed that cross-examination “is effective in exposing imperfections of perception, memory, and narration.” (Federal Rules of Evidence, Rule 801 advisory committee’s note.) Hence, hearsay statements do not offer the trier and opponent with an opportunity to test the trustworthiness of statements.

**c. Hearsay Exceptions**

Although hearsay statements are generally inadmissible, a victim’s statement may be admissible if it falls under one of the hearsay exceptions. In order to qualify as a hearsay exception, the statement must be highly reliable and/or there must be a great need for the statement. These out-of-court statements are reliable enough to satisfy the right of confrontation. White v. Illinois, *supra*. Rule 803 and Rule 804 are the exceptions to the hearsay rule under the Federal Rules of Evidence and the Arizona Rules of Evidence. Arizona’s hearsay exceptions are based on the Federal Rules of Evidence; therefore the Rules are virtually identical.

**d. Rule 803**

Hearsay statements that fall under Rule 803 “possess circumstantial guarantees of trustworthiness” that exempts them from the hearsay rule. (*Federal Rules of Evidence*, Rule 803 advisory committee’s note.) The trustworthiness of these hearsay statements enables them to be introduced whether or not the accuser is available to testify. United States v. Moore, 791 F.2d 566, 574, 20 Fed. R. Evid. Serv. 851 (7th Cir. 1986). Police reports, police testimony, photographs, Emergency 911 calls, and statements made to medical practitioners during diagnosis or treatment are examples of hearsay statements that bear adequate indicia of reliability to render them admissible under Rule 803.

**5. Rule 804**

Unlike Rule 803(a) declarant must be declared unavailable before any Rule 804 hearsay exceptions apply. Federal Rules of Evidence, Rule 804. A declarant is “unavailable” when:

- a. The declarant is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement.
- b. Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.

- c. Testifies to a lack of memory of the subject matter of the declarant's statement.
- d. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.
- e. Is absent from the hearing and the proponent of statement has been unable to procure the declarant's attendance by process or other reasonable means.
- f. Sections (a) and (b) of Rule 804 must be read together. The court must make a determination under section (a) as to whether or not a declarant is "unavailable." If the witness is unavailable, the court then determines whether any of the hearsay exceptions in section (b) are applicable to allow admission of the evidence.

As a practical matter some of the situations where a victim in a domestic violence prosecution may be found to be "unavailable" include the following:

- i. If the spousal privilege is asserted;
- ii. If the victim refuses to testify despite a court order;
- iii. If the victim is still suffering from the trauma of the domestic violence and cannot testify; and
- iv. If the victim is in hiding because of fear or has been spirited away by the defendant to prevent the witness from testifying.

The absence of the declarant may increase the need for hearsay statements, in which case hearsay statements may be admissible under one of the 804 hearsay exceptions:

[H]earsay, which admittedly is not equal in quality to testimony of the declarant on the stand, may nevertheless be admitted if the declarant is unavailable and if this statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.

(Federal Rules of Evidence, Rule 804(b)). Hence, the need for the statements outweighs the policy underlying the hearsay rule and underscores the importance of cross-examination to test the trustworthiness of a witness' statements. (Federal Rules of Evidence, Rule 803). "Considerations of public policy override the confrontation clause if two conditions are met: (1) the declarant must be unavailable, and (2) the declarant's statement must bear adequate 'indicia of reliability.'" State v. Ruelas, 174 Ariz. 37, 40, 846 P.2d 850, 853 (Ariz. App. Div. 1 1992).

If a domestic violence victim is absent from trial and thus declared "unavailable" for any of the above stated reasons, the hearsay exceptions under Rule 804 may be

utilized. A domestic violence victim may also be present at trial, but declared “unavailable,” as defined under 804(a). In State v. Anaya, *supra* the lower court declared Mrs. Anaya, the domestic violence victim, unavailable under Rule 804(a)(2): “[t]he court specifically found that Mrs. Anaya’s asserted loss of recall was deceptive and declared her unavailable as a witness.” State v. Anaya, *supra* at 538. Although the Arizona Court of Appeals did not review the lower court’s decision as to whether or not Mrs. Anaya was properly declared “unavailable,” it leaves open the possibility of applying Rule 804(a)(2) with uncooperative domestic violence victims. The advisory committee notes that the “court may choose to disbelieve the declarant’s testimony as to his lack of memory.” (Federal Rules of Evidence, Rule 804(a)(3)).

## **6. Former Testimony**

Prior testimony is a Rule 804 hearsay exception that may be used when trying to obtain statements made by a domestic violence victim. Under Rule 804(b)(1):

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding is admissible if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(Federal Rules of Evidence, Rule 804(b)(1)). The Supreme Court of Arizona permitted the introduction of testimony taken at a preliminary proceeding under Rule 804(b)(1). State v. Dixon, 107 Ariz. 415, 489 P.2d 225 (Ariz. 1971). After finding the declarant unavailable and after having found that the defendant had conducted a “very thorough cross-examination of the witness,” the testimony at the pretrial hearing was admitted into evidence. Dixon, *supra* at 419. Therefore, Rule 801(b)(1) could be used by the prosecution to introduce former testimony, including testimony taken at a preliminary hearing, of an absent or uncooperative witness in a case that involves domestic violence. Testimony given at an order of protection *ex parte* or full hearing could also be used because the defendant had the opportunity to contest and cross-examine.

## **7. Statements Under Belief of Impending Death**

Prosecution may also utilize Rule 804(b)(2) regarding statements made under belief of impending death hearsay exception, otherwise known as dying declarations, when prosecuting domestic violence abusers. In order to qualify as dying declarations, the statement must fulfill three requirements: (1) the statements must be used in a homicide prosecution; (2) the statements must be made while the declarant is under the belief of imminent death; (3) the statements must “concern the cause or circumstances of what he believed to be his impending death.” State v. Adamson,

136 Ariz. 250, 254, 665 P.2d 972, 976 (Ariz. 1983). The sense of impending death does not have to be expressly stated by the deceased, it may be inferred by the “indubitable circumstances.” State v. Adamson, *supra* at 255.

Note: If circumstances suggest that a deceased domestic violence victim’s statements were uttered during a sense of impending death, the statements may be admitted under Rule 804(b)(2). Even if the victim survives, statements made under belief of impending death may be considered under other hearsay exceptions, such as Rule 803(2).

## **8. Federal Rules of Evidence, Rule 807**

If a hearsay statement does not fit neatly into any of the exceptions, the hearsay statement may be introduced under a catchall exception. Prior to the amendment, the Federal Rules of Evidence catchall exception was located under Rule 803(24) and 804(5). After the amendment, Rules 803(24) and 804(5) were combined under the new residual exception, Rule 807. The A.R.E. still follows the organization of the Federal Rules prior to the creation of Rule 807. Therefore, Arizona’s catchall exception is still located under Rule 803(24) and Rule 804(5). The language of the catchall exceptions under the Federal and Arizona Rules of Evidence is identical. A statement introduced under the catchall exception must have the following requirements:

- a. The statement is offered as evidence of a material fact.
- b. The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- c. The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

(Federal Rules of Evidence, Rule 807, A.R.E., Rule 803(24), 804(5)). The catchall exception functions to allow the introduction of hearsay statements that demonstrate a certain level of trustworthiness but that do not fit under any of the specific exceptions:

[T]hese exceptions, while they reflect the most typical and well-recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact. The committee believes that there are certain exceptional circumstances where evidence, which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions,

and to have a high degree of probativeness and necessity, could properly be admissible.

(Federal Rules of Evidence, Rule 803(24) report of Senate Committee on the Judiciary). The rationale behind the residual exception is that “federal courts have discretion to admit hearsay evidence, where such evidence is found to be necessary and reliable.” State v. Hughes, 120 Ariz. 120, 124, 584 P.2d 584, 588 (Ariz. App. Div. 2 1978). “Factors a trial court should consider include such things as ‘spontaneity,’ ‘consistent repetition,’ ‘the mental state of the declarant,’ and ‘lack of motive to fabricate.’” State v. Valencia, 186 Ariz. 493, 498, 924 P.2d 497, 502 (Ariz. App. Div. 1 1996).

## **9. Character Evidence**

Under *Rules of Evidence*, Rules 402 and 404(b), evidence of prior crimes, wrongs, or acts is admissible if it is relevant to some issue at trial other than the defendant’s character, and the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice. In DV cases the state may seek admission of both prior and subsequent acts of domestic violence of the defendant against the victim to prove the defendant’s motive, intent or plan on the date of the offence. The state has the burden of proof to show by clear and convincing evidence that the prior bad acts were committed, and it was the defendant that committed them. In addition, the court must be convinced that the evidence:

- a. Is admitted for a proper purpose;
- b. Is relevant; and
- c. Its probative value is not substantially outweighed by its potential for unfair prejudice.

In addition, if the court determines that the state has met its burden and finds that the evidence is admissible, it must give the jury an appropriate limiting instruction.

The courts have viewed crimes of domestic violence as unique. In that context, courts have allowed evidence of prior and subsequent acts of domestic violence committed against the same victim to be admitted into evidence under Rule 404(b). See Wood v. Wood, 180 Ariz. 53, 881 P.2d, 1158 (1994); State v. May, 137 Ariz. 183, 669 P.2d 616, (App. 1983); State v. Gulbrandson, 184 Ariz. 46, 906 P. 2d 579 (En Banc 1995); US v. Frank, 11 F. Supp. 2d 314 (1998).

## **10. Conclusion**

Fact finding in domestic violence cases presents challenges no more difficult than many other types of cases. The lethality rate is very high in domestic violence criminal assaults.

Excited utterances can be used even though the victim knew she was a target or a significant amount of time may have gone by. Then existing mental, emotional, or physical condition can be used to prove an element of the crime. Evidence of previous assaults is admissible to show motive, malice or premeditation. Prior and subsequent acts of the defendant can also be used to show intent.

In addition to the victim's statements, medical records can be obtained to establish the assault. Other public records and previously recorded statements can be used including testimony in an order of protection, divorce or dependency case. While the victim does not have to be declared unavailable, she can be so declared because of refusal to testify, alleged loss of recall, the trauma of the violence and its effects, or if she is in hiding. An expert witness can be used to explain the dynamics of domestic violence and recantation.

## **Chapter XII**

### **A.R.S. § 13-3601(M) Domestic Violence Diversion**

Pursuant to A.R.S. § 13-3601(M), the court may, with the agreement of the defendant, at the time of sentencing, place the defendant into a domestic violence diversion program.

In cases where the defendant is found guilty of a domestic violence offense and where probation is available, A.R.S. § 13-3601(M) allows the court, without entering a judgment of guilt, to defer further proceedings and place the defendant on probation for a definite period of time. The court must impose conditions that are necessary to protect the victim. Additionally, the court may impose any other conditions upon the defendant that it deems appropriate. The court may impose a counseling program at its discretion.

If the defendant fulfills all of the court's requirements during the period of probation the court will then dismiss the charges against the defendant. If the defendant fails to complete the required terms then the court will enter the judgment of guilt.

However, it is important to note that A.R.S. § 13-3601(M) does not apply if the defendant has either previously been sentenced or had charges dismissed pursuant to this subsection.

#### **A. Requirements for Eligibility**

1. The defendant cannot have previously been convicted of a domestic violence offense.
2. The defendant cannot have previously participated in a diversion program.
3. The court must proceed through the guilty plea proceeding with the defendant, and the defendant must enter a plea of guilty to a domestic violence offense.
4. The court withholds the entry of the judgment of guilt, and places the defendant on probation.
5. In addition to the standard terms of probation, the court shall include an order that protects the victim.

#### **B. Additional Terms**

In addition to the standard terms of probation, the court may include the imposition of a fine or restitution, jail, and the completion of an approved domestic violence offender treatment program.

If the defendant violates any term of probation, the court may enter an adjudication of guilt and proceed as otherwise provided for revocation of probation. Remember that if the defendant, probation officer or the state seeks to modify any sentence, the court must give

notice and opportunity to be heard to the victim. Pursuant to A.R.S. § 13-3601(N), the court must provide the defendant with the following written notice:

“You have been diverted from prosecution for an offense included in domestic violence. You are now on notice that:

1. If you successfully complete the terms and conditions of diversion, the court will discharge you and dismiss the proceedings against you.
2. If you fail to successfully complete the terms and conditions of diversion, the court may enter an adjudication of guilt and proceed as provided by law.”

If the defendant fulfills the terms and condition of probation or of intensive probation, the court shall discharge the defendant and dismiss the charges against the defendant (See A.R.S. 13-3601(M)). A diversion under A.R.S. 13-3601(M) is not available if the person has been previously convicted of a domestic violence offense or had a domestic violence offense dismissed pursuant to A.R.S.13-3601(M).

### **C. Final Disposition Report** (*See Appendix A for form*).

The Final Disposition Report (FDR) should be completed with a “DS” (Deferred Sentencing) in Box 17. The original should be sent to DPS with a copy retained for the court’s file.

1. If the defendant successfully completes probation, the copy in the court’s file should be amended as follows:
  - a. Place an X in box 16 to show amended;
  - b. Line through the “DS” in Box 17;
  - c. On Line b, write “released from probation on charge” and place “CD” in Box 17, and
  - d. Amend the form to indicate the new disposition date.
2. If the defendant does not successfully complete probation,
  - a. The prosecutor should file a motion for entry of judgment and a petition to revoke probation, and

- b. The FDR should be revised if the JO grants the motion for entry of judgment and the probation is revoked:
  - i. Box 16 should be marked to indicate the charge is being amended;
  - ii. Box 17 of the FDR should have “DS” lined through;
  - iii. Line b should read “probation has been revoked on charge”;
  - iv. Box 17 on Line b should read “GG,” and
  - v. Amend the FDR to reflect the new disposition date.

## **Chapter XIII**

### **Sentencing**

#### **A. Philosophy**

Domestic Violence is a learned behavior (through observation, experience, reinforcement, culture, family, community) and is rarely caused by substance abuse, genetics, stress, illness, or problems in the relationship, although these factors are often used as excuses and can exacerbate violent behavior. Many batterers believe they have the right to make and enforce rules, and many victims routinely evaluate/decide which rules they will follow, depending on a variety of factors, such as the dangers presented, the available intervention, and the likelihood of punishment of the perpetrator.

Domestic Violence is about power and control. Violence is a choice, not an “out of control” behavior. Stopping the violence requires a new response that considers the dynamics unique to domestic abuse. Common effects of violence on victims are low self-esteem, self-blame or blaming circumstances, stress, shame, unawareness of legal and social options, self medicating by use of alcohol and/or drugs; suicidal ideation, isolation from family and friends, minimizing the violence or rationalizing batterer behavior, and fear.

Common perpetrator attitudes and conduct include: consistent attempts to control alleged victim, minimizing, denying own behavior and blaming victim or others instead of self, low self-esteem, jealousy and possessiveness, intimidating, dependency on victim, appearing presentable and even likeable in court but Jekyll-Hyde personality at home, promising “it will never happen again,” and substance abuse.

#### **1. Goals in sentencing domestic violence cases include:**

- a. Hold the perpetrator accountable;
- b. Change perpetrator behavior;
- c. Provide clear and consistent consequences for failure to follow court mandates;
- d. Protect the abused party, children, other family members and the general public;
- e. Provide restitution to the abused party, to convey to the general public that domestic violence is a crime and “not just a family matter;” and
- f. Break the inter-generational cycle of violence.

The court should consider incarceration, restitution, fines, monitored probation with specific conditions, community control, community service hours, mental health evaluation and treatment (mandatory), parenting classes, offender treatment programs, drug and alcohol

treatment, stay away from victim and children order (if necessary). Timely enforcement of the court's Sentencing Order is essential to insure victim safety and due process. Schedule case monitoring conferences when necessary. Require regular probation reports on domestic violence offenders.

Courthouses have become places of vulnerability for victims of domestic violence and for those involved in the court system. The judge should ensure a safe environment that will more effectively allow the focus to remain on the goals established by the sentence.

## **2. Victims**

Please refer to either of these web sites:

- a. Arizona Judicial Branch site, Domestic Violence information page located at: [www.supreme.state.az.us/dr/dv/dv.htm](http://www.supreme.state.az.us/dr/dv/dv.htm).
- b. Wendell, the Arizona judicial reference site for Domestic Violence located at: [www.supreme22/ctserv/drunit/dv/dvsafe.htm](http://www.supreme22/ctserv/drunit/dv/dvsafe.htm).

## **3. Sentencing Objectives in Domestic Violence Cases**

- a. Stop the violence;
- b. Protect the victim;
- c. Protect the children, and other family members;
- d. Protect the public;
- e. Treat domestic violence as a serious crime, and to communicate that to the offender and to the victim;
- f. Hold the offender accountable for the violent behavior and for stopping that behavior;
- g. Rehabilitate the offender; and
- h. Provide restitution for the victim.

## **4. Primary Considerations in Sentencing**

There are three primary considerations in sentencing. *See* A.R.S. § 13-101.

- a. To proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;

- b To ensure the public safety by preventing the commission of offenses through the deterrent influences of the sentences authorized; and
- c To impose just and deserved punishment on those whose conduct threatens the public peace.

The way in which the court handles a domestic violence case, whether it results in conviction and sentencing, diversion, or even dismissal, plays a critical role in addressing the conditions which allow domestic violence to continue and to escalate.

## **5. Children Exposed to Violence by a Perpetrator**

A.R.S. § 13-702(C)(17) states that committing a domestic violence crime in front of a child is an aggravating factor in sentencing, giving prosecutors the option to charge with a greater offense and judges the option of granting a tougher sentence. Therefore, while many children are exposed to domestic violence, it is still very important for judicial officers to take this into consideration, but not hold the non-offending parent liable.

It is estimated that every year, 3.3 million children are exposed to violent assaults by one parent against the other. Many gaps and inadequacies exist in the research on the impact of domestic violence on children. Currently, studies by psychologists and social workers look at behavior, psycho pathology and parenting styles but fail to look at maternal and child health, maternal and child functioning, and the impact of exposure to physiological changes in the brain. Some research has shown that there may be permanent chemical brain changes from exposure to violence as a child. Other studies have shown that removal of the child from the primary caretaker is extremely traumatic for the child and the worst possible intervention.

Studies have shown that children's perceptions are affected by the abuse in that they become inflexible and can develop attachment insecurity, which can later result in pathological reactions to separation. They can develop maladaptive interpersonal relationships with insecurity, hostility and nurturance seeking behavior simultaneously. Studies consistently show that for males, witnessing aggression against a parent is a more accurate predictor of being aggressive in their own relationships than is actually being abused themselves as a child. They learn the power violence creates, not the pain it leaves behind. For girls, witnessing domestic violence is a predictor of being abused in their own relationships.

However, it is important that non-offending parents are NOT held accountable for the behaviors of the perpetrator of the violence. Victims of domestic violence often stay in abusive relationships because of threats an abuser may have made towards children, such as telling her that if she leaves, he will take the children or hurt them in some way. Also, victims (and their children) are in far greater danger of being hurt or killed AFTER leaving a violent home. Therefore, the actions of the abuser must be where judicial attention lies. Holding a victim accountable for the violence

her children are exposed to by the perpetrator only further victimizes her and her children.

## **6. Cyber Stalking**

In addition to the standard options available to judges in sentencing defendants, judges may need to place more stringent controls upon the defendant in Cyber stalking cases. Such controls could include a bar to computer ownership and/or use, prohibitions for using the Internet, E-mail, or chat rooms, and bans of other forms of electronic communications such as E-mail via a cellular phone. Although this may not completely solve the problem, it may provide the victim some amount of security.

## **7. Restitution**

### **a. Court's Duty to Award Restitution**

The court is required to order a convicted person to make restitution to the person or persons who are the victims of a crime in the full amount of the economic loss as determined by the court. Economic loss is defined as, "any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages." (A.R.S. § 13-105 (14)). It is only required that there is a nexus between the crime and the injury/damages sustained to be eligible for restitution.

The amount of restitution is *not limited* in misdemeanor offenses. The court *shall not* consider the economic circumstances of the defendant in determining the amount of restitution. After the court determines the amount of the restitution, the court then shall decide the manner in which restitution is to be paid. When deciding the manner in which the restitution is to be paid the court *shall* consider the economic circumstances of the defendant. The fault of the victim should not be considered in the restitution award. State v. Clinton, 181 Ariz. 299 (App. 1995).

### **b. Other important aspects of restitution include the following.**

In cases where the victim is deceased the restitution should be paid to the immediate family of the victim. (A.R.S. § 13-603(C), *see also*, Arizona Constitution, Art. II, Sec. 2.1 (A)(8)). If the defendant pleads guilty but insane, then no restitution is awarded. Additionally, if a defendant admits to an uncharged crime involving the same victim, then the court may award restitution for that offense as well.

**c. Restitution eligibility**

Restitution may be awarded for several different areas of economic loss. The courts are given wide latitude in determining what constitutes economic loss. Although restitution awards may include the following items, it is not a totally inclusive list.

**i. Medical Expenses**

This includes medical bills due to injuries stemming from the crime. This may also include lost wages for time taken off from employment to attend medical appointments and treatment. State v. Howard, 163 Ariz. 47 (App. 1989), *rev'd denied* Jan. 1990; *In re Erika V.*, 297 Ariz. Adv. Rep. 55 (App. 1999). Medical expenses also may include any counseling that the victim attended in order to deal with the trauma of the crime. Additionally, the fact that the victim has insurance does not preclude an order of restitution. Restitution payments may be awarded to the victim's insurance company for insurance benefits paid to the victim.

**ii. Lost Wages/Travel Expenses**

Lost wages due to time lost from work are recoverable as restitution. This encompasses time taken off from work when the victim is recuperating, attending medical appointments, or attending court proceedings.

Travel expenses to attend court are also recoverable. This may include the cost of transportation, hotel, parking, and any other expenses necessary for the victim to attend the court proceedings. Additionally, it is not required that the victim be subpoenaed for a court appearance to collect restitution. State v. Lindsley, 252 Ariz. Adv. Rep. 46 (App. 1997), *rev'd denied* April 1998, State v. Morris, 173 Ariz. 14 (App. 1992), *rev'd denied* Nov. 1992. It is important to note that the victim has the right to be present at all court proceedings.

**iii. Property Damage**

Property damage is recoverable where the victim has an interest in the property. The fact that the parties are married and the property is community property is not a defense and does not preclude restitution. (*See* A.R.S. § 13-105(14)). The court may order that the defendant reimburse the community for any lost monetary value.

**iv. Moving Expenses**

Moving expenses may be recoverable.

**v. Unique Items**

Often, unique items with high depreciation costs may be damaged. In those cases, the court may order the full replacement cost of the item. For example, a new automobile is damaged soon after ownership. As a new automobile is a unique item, which depreciates quickly after purchase, the victim could recoup the full replacement cost even if such a cost is greater than the current market value. Therefore, the victim is made whole.

**d. Restitution Hearings**

As the court is charged with determining the amount of restitution to be awarded it is imperative that the court receives the proper information to make a ruling. In cases where the court does not have sufficient evidence to determine the amount of restitution or the manner in which it is to be paid, the court may conduct a restitution hearing. The order of restitution may be supported by evidence or information introduced or submitted to the court before sentencing or any evidence previously heard by the judge during the proceedings. (A.R.S. § 13-804(A-G)).

At the hearing the victim, defendant, or other witnesses may be called to testify and produce information or evidence. Bills, receipts, and estimates may be considered as evidence. Although such information is very helpful to the court, the lack of bills and receipts does not bar a restitution award. The court may consider the victim's testimony on the amount of loss without any further corroboration in making its decision.

The state does not represent the person(s) who have suffered economic loss, but may present evidence or information relevant to the issue of restitution. Remember the victim may present any evidence which supports her/his claim of restitution, and then the court must decide the amount and manner in which the restitution is to be paid.

**e. Restitution Lien**

A restitution lien shall be created in favor of the state or any other person for the total amount of the restitution, fine, surcharges, assessments, costs, and fees ordered, if any. The procedures for creating and filing a restitution lien as well as the effect of a restitution lien are set forth in A.R.S. § 13-810.

**f. Sentencing/probation**

It is required that restitution be paid promptly to the victim. The court has several methods in which to accomplish this. Although it is the court's duty to ensure that the victim is paid promptly, the court may consider the defendant's economic circumstances when deciding the method of payment.

If a defendant does not pay promptly, several options are available. If the defendant is on probation, the state or probation officer may file a petition to revoke. If the court finds that the defendant did not comply with its order, the court may find the defendant violated his terms and conditions of his probation and sentence him accordingly. The court may also issue an order to show cause and utilize its contempt powers. Furthermore, the court may convert the judgment to a restitution lien as discussed above.

**B. Incarceration**

The U.S. Attorney's Task Force on Family Violence, Final Report (Washington D.C.: U.S. Department of Justice, 1984) concluded that in serious cases, incarceration is the only punishment that fits the crime. This Report stated at pages 34 and 36:

The imposition of a just sentence is the desired culmination of any criminal judicial proceeding. The sanction rendered is not only punishment for the offender but also an indication of the seriousness of the criminal conduct and a method of providing protection and support to the victim. Too often, in family violence cases, the sentence fails on all three counts.

In all cases when the victim has suffered serious injury, the convicted abuser should be sentenced to a term of incarceration. In cases involving a history of repeated abusive behavior or when there is a significant threat of continued harm, incarceration is also the preferred disposition. In serious incidents of violence, incarceration is the punishment necessary to hold the abuser accountable for his crime. It also clearly signals the seriousness with which the offense is viewed by the community and provides secure protection to the victim.

Judges and the sentences they impose can strongly re-enforce the message that violence is a serious criminal matter for which the abuser will be held accountable. Judges should not underestimate their ability to influence the defendant's behavior. Even a stern admonition from the bench can help to deter the defendant from future violence.

**1. Imprisonment Statutes**

These statutes are found generally at A.R.S. §§ 13-701 through 711. The Arizona Supreme Court's sentencing chart is available at the following web site:

[www.supreme.state.az.us/aoc/crimcode.htm](http://www.supreme.state.az.us/aoc/crimcode.htm).

## **2. A.R.S. § 13-3601 Sentencing Options**

Effective January 1, 1999, a person who commits a second misdemeanor domestic violence offence within 60 months may be placed on supervised probation by a limited jurisdiction court for up to 12 months and may be incarcerated as a condition of probation.

A.R.S. § 13-3601.02 provides that a person convicted of aggravated domestic violence, a Class 5 felony, who has been convicted of two domestic violence offenses within sixty months, must serve four months in jail. Conviction of three domestic violence offenses within sixty months results in a mandatory eight months in jail.

## **3. Factors to Consider in Sentencing:**

- a. Prior convictions;
- b. Pattern of violent conduct;
- c. Dangerous animosity;
- d. Presence of children;
- e. Prior treatment for domestic violence;
- f. Substance abuse;
- g. History of threats to others;
- h. Great bodily injury or threats of great bodily injury;
- i. Viciousness and/ or callousness;
- j. Use of weapon;
- k. Victim particularly vulnerable;
- l. Multiple victims;
- m. Planning or sophistication indicating premeditation;
- n. Sexual assault - escalation to sexual assault is often the precursor to murder;  
and
- o. Pregnancy of victim. (A.R.S. §§ 13-711 and 13-3601(L)).

## **C. Rehabilitation/Holding the Offender Accountable**

### **1. Status Hearings**

The Judicial Officer, on his or her own authority, can order a defendant to appear and provide proof of compliance with court orders. Failure to comply may be addressed by one of two methods:

- a. A finding of contempt pursuant to an Order to Show Cause Hearing. (*See Arizona Rules of Criminal Procedure, Rule 33.3*).

Note: Probation time is not tolled by filing an order to show cause or a finding of contempt. Defendants may have their probation time expire precluding the court from re-ordering counseling. A petition to revoke probation tolls the time of probation from the date of filing to the date of disposition. The tolled time is added on to the end of the original date providing the court more time to require a defendant to complete counseling.

- b. If there is reasonable cause to believe that a probationer has violated a written condition or regulation of probation, the probation officer or the prosecutor may file a petition to revoke probation.

### **2. Orders to Show Cause Hearings**

The court should monitor a defendant's progress in counseling following the sentencing. One way to do this would be to set a hearing in front of the sentencing judge for any reported non-compliance by the defendant. This hearing is called an order to show cause hearing and invokes the contempt powers of the court. (*See Arizona Rules of Criminal Procedure, Rule 33.3*). An independent prosecutor must file the petition alleging non-compliance. It is not necessary to file a petition to revoke a defendant's probation before setting an order to show cause hearing. The defendant should be given personal notice of the hearing date. The hearing notice should give the defendant an idea about the nature of the hearing, and that their failure to appear at the hearing could result in a warrant for their arrest. Since a finding of contempt for failure to comply with the court order to complete treatment may result in a jail sentence, the court should appoint the defendant an attorney if the defendant is indigent. (*See Chapter VII on Appointment of Counsel*).

At the hearing the prosecutor could present evidence about the alleged non-compliance to the court. The defendant would be given an opportunity to respond. The burden of proof in a criminal contempt proceeding is beyond a reasonable doubt.

If the court finds the defendant in contempt, the court must decide the appropriate punishment. This may be the imposition of any jail time that was to be suspended upon completion of counseling, or the court could order that defendant be sentenced to a separate jail term or fine. (*See Arizona Rules of Criminal Procedure, Rule 33.4*

regarding limitations on punishment absent a jury trial or waiver). The court would also have the option of setting sentencing at a later date and give the defendant an opportunity to comply.

Sentencing can be aimed at punishment or rehabilitation or both. Counseling and community service are important elements. (*See* article by Dr. Gainey, **Appendix E**).

## **D. Necessary Information for Meaningful Sentencing**

Whether a domestic violence case results in conviction and sentencing, diversion, or even dismissal, the court's handling of the case plays a critical role in addressing the conditions that allow domestic violence to continue and to escalate. An effective disposition calls for a substantial amount of information and a pre-sentence report will almost always be necessary but may not always be possible.

### **1. Significant Factors the Judge Should Require:**

#### **a. The defendant's criminal history**

Although there is frequently a history of past arrests, criminal records will often reflect only a small percentage of the true violence occurring. The court should know the dispositions of all arrests, and whether the defendant has been ordered into treatment before and with what success.

#### **b. Impact of the violence on the victim and the victim's desires as to disposition**

Victims or their survivors should always have a chance to be heard at sentencing.

#### **c. History of abusive behavior**

This information may not be reflected in the criminal record. Judges should look for escalation of violence (increase in frequency and severity over time) and for the presence of multiple victims.

#### **d. Drug, alcohol, and mental health evaluations**

NCFJCJ Family Violence Project found a very consistent 80% correlation of domestic violence cases with drug and alcohol problems. The presence of cocaine may increase the risk of severe injury and the presence of bi-polar (manic-depressive) borderline, or obsessive disorder may increase the risk of stalking behavior against the victim.

**e. History of prior court contact by the family**

The judge should know about all other court contacts and the existence of any other court orders.

**f. Information about children and other people living in the home**

Children who are bystanders to violence are seriously victimized, and the court should address their needs in order to attempt to intervene in their learning to be abusers themselves. Counseling may need to be arranged for the children, assessment and short term counseling at a minimum. Children who are chronically exposed to violence are traumatized.

**g. Lethality assessment on the defendant**

In making release and sentencing decisions, judges must take into account the potential for re-offense, the dangerousness of the defendant, and the potential harm to the victim. Lethality assessments have not been measured nor proven to be accurate predictors of homicide. The factors have, however, been useful to predict dangerousness of the defendant.

Level of dangerousness and warning signs are:

- i. Separation or attempt at separation by the victim – i.e. the victim tries to leave or files for divorce;
- ii. Use of drugs and/or alcohol - While it does not cause domestic violence, it often increases the severity of the assault;
- iii. Depression or other mental illness in the perpetrator - Again, mental illness does not cause the violence, but can be a disinhibiting factor to increase the severity;
- iv. Access to weapons - 70% of domestic violence murders in Arizona are committed with weapons;
- v. Stalking - symptom of obsession;
- vi. Rage - is not a cause of domestic violence but can be used as an excuse;
- vii. Obsession - if I can't have you, no one else can;
- viii. Threats of homicide and/or suicide - must be taken seriously;
- ix. Easy access to victims and/or children - often in court ordered visitation exchanges;
- x. History of domestic violence or other violence - including violence to pets;
- xi. Increasing isolation;
- xii. Sexual assault/forced sex with partner - the precursor to murder; and
- xiii. Escalation of any of the abuse.

**h. Safety planning for the victim**

See <http://www.supreme.state.az.us/dr/dv/dv.htm>

Where judges do not have adequate probation support, they may be able to elicit some of this information in questioning witnesses at sentencing.

**2. Factors NOT Relevant to Sentencing Considerations**

- a. Marital problems;
- b. Lifestyles;
- c. Number of protective orders; and
- d. Presence or absence of protective orders.

**3. Other Types of Sanctions**

- a. Counseling;
- b. Probation;
- c. Incarceration combined with other sanctions; and
- d. Work release/furlough/electronic monitoring.

**4. A.R.S. § 13-702 (C) Aggravating Circumstances**

When considering sentencing in domestic violence cases, with the exception of A.R.S. §§ 13-711 and 13-3601(L) (pregnancy), no different factors apply. What is different, however, is the need for understanding the dynamics of violence within a relationship to allow the proper weights to be given the factors.

For the purpose of determining the sentence the court shall consider the following aggravating circumstances:

- a. Infliction of or threatened infliction of serious physical injury (A.R.S. § 13-702(C)(1)).**

While 80% of domestic violence cases are charged as misdemeanors, the majority of injuries suffered by the victims would qualify the act as a felony. Most victims leave 5-7 times before they are able to escape. Almost no victim calls the police at the first instance of violence

- b. Use or threatened use or possession of deadly weapons** (A.R.S. § 13-702(C)(2)).

In the home, many things can be deadly weapons or dangerous instruments. Studies of violence in the home show that perpetrators use phone cords, coat hangers, cigarettes, belts, irons, lamps, tire irons, “almost anything” in their abuse of family members.

- c. Taking of or damage to property** (A.R.S. § 13-702(C)(3)).

Since Arizona is a community property state, that means both parties own 50% of the community property. If a perpetrator destroys community property, he is destroying another person’s property because only 50% belongs to him. The other 50% belongs to another person. It is, of course, impossible to destroy half a television, or radio, or car. It either works or it doesn’t. So if a married person destroys community property, which is the property of the other party, it should be an aggravating factor.

- d. Heinous, cruel or depraved manner in which offense was committed** (A.R.S. § 13-702(C)(5)).

Violence in the home is often especially cruel and heinous. The perpetrator, as part of the process of destroying the victim’s ability to escape, will call the victim stupid, ugly and incompetent. Often the most important identity aspect of a victim will be destroyed: e.g. forcing her/him to cut her/his hair, slashing her/his face to destroy her/his looks, or breaking her/his fingers so s/he cannot play the piano. The violence may occur not only in front of the children so they can witness the victim’s humiliation, but the children may also be told how stupid and useless s/he is and encouraged to insult and attack her/him themselves. This cruelty continues the intergenerational cycle of violence. Sleep deprivation is another common form of torture batterers inflict on victims.

- e. Defendant is public servant.** (A.R.S. § 13-702(C)(8)).

Research has shown that violence in police families is approximately twice as frequent as in non-police families. Since the police are also the first line of defense for the battered woman, it is especially damaging when the perpetrator is a police officer. The victim has nowhere to turn and the public loses confidence in law enforcement.

- f. Physical, emotional and financial harm caused to victim** (A.R.S. § 13-702(C)(9)).

Often the harm suffered by the victim is hidden. Her injuries may be internal or to her reproductive organs including breasts. After years of violence, her

emotional condition may have deteriorated significantly and post traumatic stress becomes an everyday condition. Often battered women are misdiagnosed as borderline schizophrenic or having other mental health problems. In fact, the problem is the violence with its resulting trauma. Additional financial harm should be considered in necessary treatments for depression, anxiety and physical conditions such as dental surgery to repair damage to the mouth, reconstructive surgery to the face or eyes, or medication for migraines or other head injuries. The existence of head trauma among victims of domestic violence is just being studied.

**g. Crime(s) committed out of malice toward victim's identity (A.R.S. § 13-702(C)(15)).**

Much controversy swirls around the definition of violence against women as a hate crime. Some state statutes cover it and some don't. While the issues of proof are difficult, if there is evidence such as name calling ("cunt, bitch, whore"), degradation of reproductive capacity (pregnant cow, breeder, milk factory), or reliance on stereotypes (She didn't cook my dinner right; she didn't keep the kids quiet; she didn't clean the house right), then evidence of malice toward the victim's group identity is present.

**h. Defendant lying in wait for victim (A.R.S. § 13-702 (C)(17)).**

A perpetrator will often "lay in wait" for the victim. Common tactics include to wake her/him when s/he is sleeping, to pounce the minute the victim walks in the door, to assault the victim when her/his hands are otherwise occupied e.g. holding a child or bag of groceries.

**i. Offense was committed in the presence of a child. (A.R.S. § 13-702(C)(18)).**

Studies have shown that 100% of children in homes where domestic violence is occurring know of the violence. Even if the child is not in the same room, there is no mistaking the sounds of violence. Children are negatively impacted by knowing a parent and caretaker is being beaten; they do not need to physically be present in the room.

**5. A.R.S. § 13-702(D) Mitigating Circumstances:**

**a. Age of the defendant (A.R.S. § 13-702(D)(1)).**

Perpetrators of young years cannot be excused because of their age. In fact, they could be held more responsible because they have had the benefit of 25 years of societal education on issues of domestic violence. Elderly perpetrators likewise will often try to excuse themselves by saying that violence in the home was acceptable when they grew up. But they too have

had 25 years of public education to learn different patterns and violence has always been a crime, whether in the home or not.

**b. Defendant's capability to appreciate wrongfulness of conduct (A.R.S. § 13-702(D)(2)).**

Often perpetrators will argue that they did not know the wrongfulness of their acts because it was accepted in their home or country of origin or in society in general. Unfortunately, violence against women has been largely accepted, and still is in many respects, in this country and others. However, ignorance of the law is no excuse in other types of crime and should not be in DV cases.

**c. Unusual or substantial duress (A.R.S. § 13-702(D)(3)).**

A common explanation from perpetrators is a variation on the old comic theme "the devil made me do it." Only this time, the claim is "the victim made me do it." Unless the perpetrator is found not responsible under A.R.S. §§ 13-501-503, every person is responsible for his or her own actions. The perpetrator may claim the victim "nagged" him/her. Even if the victim did, "nagging" is not a criminal offense. Holding perpetrators accountable for their own behavior, their own choice to break the law, is the only way to stop domestic violence.

**d. Defendant's minor degree of participation in crime (A.R.S. § 13-702(D)(4)).**

**e. Any other factor that the court deems appropriate to the ends of justice. (A.R.S. § 13-702(D)(5)).**

**6. Impact of Pregnancy**

A.R.S. § 13-711 and A.R.S. § 13-3601(L) both provide for an increase in sentencing if the victim was pregnant. A.R.S. § 13-711 does not require "knowing" and does not specify what the possible increase may be. A.R.S. § 13-3601(L) requires "knowing" and specifies that the maximum sentence shall be increased up to two years.

**E. Types of Sanctions**

**1. Counseling**

A.R.S. § 13-3601.01 states: "The judge shall order a person who is convicted of a misdemeanor domestic violence offense to complete a domestic violence offender treatment program that is provided by a facility approved by the department of health services or a probation department. If a person has previously been ordered to complete a domestic violence offender treatment program pursuant to this section,

the judge shall order the person to complete a domestic violence offender treatment program unless the judge deems that alternative sanctions are more appropriate. The department of health services shall adopt and enforce guidelines that establish standards for domestic violence offender treatment program approval.” (See **Appendix F**, Paragraph C).

## **2. DHS vs. Probation Approval**

The Arizona Department of Health Services has adopted guidelines for domestic violence treatment programs. Those Guidelines are attached in **Appendix F**. The Department has compiled a list of approved Misdemeanor Domestic Violence Offender Treatment Programs which is attached as **Appendix G**. Approved agencies may operate satellite programs not to exceed twenty hours per week.

When the perpetrator appears to have a substance abuse problem, the court should consider ordering concurrent treatment for substance abuse and domestic violence. Domestic violence and substance abuse are separate problems that require separate solutions.

Any court-ordered treatment should be accompanied by an admonition that failure to follow through may result in revocation of probation and reinstatement of criminal charges.

Victims should not be required to participate in court-mandated treatment programs intended for perpetrators. Perpetrators must take responsibility for their violent behavior in order for treatment to be successful. In most cases, the victim is not a party to the criminal action so the court lacks jurisdiction to make such an order, and to do so only reinforces the perpetrator’s tendency to externalize the cause of the violence onto others.

Monitoring the perpetrator’s progress in court-ordered treatment programs should be shared between the probation officer and the counselor who should work together.

In domestic violence cases, the Court should order, as a term of probation, that “the defendant shall attend and complete all screening and counseling sessions as ordered by the probation officer”. The Court should admonish the defendant that any failure to complete this term could result in the revocation of probation and reinstatement of the criminal charge(s).

Upon determination that the defendant needs both substance abuse and domestic violence treatment, the defendant should receive substance abuse treatment before receiving domestic violence treatment. Ordering consecutive treatment programs minimizes the defendant’s scheduling conflicts as well as the financial burden of paying for two programs at the same time.

When a person is placed on supervised probation for a domestic violence offense, it is important that the probation officer have great discretion in determining whether there should be any contact with the victim or the victim's family. Prior written approval by the probation officer should be considered. The probationer should be required to attend and successfully complete domestic violence counseling as opposed to anger management counseling. The probation officer should be given access to progress reports and attendance in counseling programs. If appropriate, curfew restrictions may be considered.

It can be utilized to help monitor the behavior of the probationer. It would be included if the probation officer felt it would be appropriate. Relevant terms or restrictions would prohibit the probationer from going near the work or homes of the victim's family. Another example would be to restrict the probationer's driving. This would help avoid the probationer from making contact with the victim. When sentencing a defendant for a second domestic violence offense, the court may want to seriously consider placing him/her on supervised probation after some jail time.

### **3. Probation Revocation: A.R.Cr.P., Rules 27.5, 27.6, 27.7, 27.8, 27.9, 27.10**

#### **a. The Petition**

The revocation of probation begins with filing a petition with the court by the probation officer or the prosecutor. The petition must set forth specific allegations based upon reasonable cause that the probationer has violated a written term of probation. A summons is sent to the probationer's last known address. The rules set forth specific time periods in which hearings must be held. The arraignment shall be held no more than 7 days after service of the summons, or the probationer's initial appearance following their arrest on a warrant. (Note: *see* A.R.Cr.P. Rule 1.3 regarding computation of time).

#### **b. The Arraignment**

The revocation arraignment must be on the record. At the arraignment, provide the probationer with a copy of the petition. Advise the probationer of their constitutional rights, as if you were conducting a first time arraignment on a criminal offense. Make sure the probationer understands their rights and the allegations in the petition. Consider the appointment of counsel for the probationer if requested or if it is necessary in the interests of justice. The court should inform the probationer of each alleged violation of probation and the probationer shall admit or deny each allegation. If no admission is made or if an admission is not accepted, the court sets the case for a violation hearing in the sentencing court no less than 7 days and no more than 20 days after the arraignment.

If the probationer wants to admit the violations contained in the petition, the court should address the probationer personally and advise them of the rights they will be waiving upon admitting the allegations. A recitation by the judge of the standard rights contained in a waiver form for a change of plea will satisfy this requirement. The probationer should also be informed that if the alleged violation involves a criminal offense for which he or she has not yet been tried, regardless of the outcome of the present proceeding, he or she may still be tried for that offense, and any statement made by the probationer at the proceeding may be used to impeach his or her testimony at trial.

**c. Violation Hearing**

The revocation hearing must be on the record. The State must present evidence to prove the allegations in the petition. The standard of proof is by a *preponderance of the evidence*. The probationer's personal appearance is required (Note: *see* A.R.Cr.P., Rule 27.9 for specific steps to proceed *in absentia*). If the defendant fails to appear, and the court cannot proceed *in absentia*, a warrant should be issued. The court may consider any reliable evidence not legally privileged, including hearsay. Probation revocation hearings are flexible and not subject to the same rules of evidence and procedure as govern criminal trials. If the court finds that a specific violation of a condition or regulation of probation occurred, it shall make a specific finding of the facts which establish the violation and shall set a disposition hearing no less than 7 days nor more than 20 days after the hearing (Note: the probationer can waive these time limits and proceed immediately with disposition). If the court finds that the state has not met its burden, the court shall dismiss the petition.

**d. Disposition**

The disposition hearing must be on the record. At the disposition hearing, the court can revoke, modify or continue the probation. If probation is revoked, the court shall pronounce sentence in accordance with the procedures set forth in Rules 26.10 through 26.16. Probation shall not be revoked for a violation of a condition or regulation for which the probationer did not receive a written copy. A pre-sentence report may be prepared for the judge, and the judge may consider evidence of aggravation or mitigation. When revoking probation, the trial court must impose the sentence for the original crime and does not have the authority to punish the defendant for violation of probation alone. (*See State v. Baum*, 182 Ariz. 138, 893 P. 2d 1301 (App. 1995)).

**e. Special Considerations**

The victim has the right to be present and heard at any proceeding involving the termination of probation, the revocation disposition, and any modification of the terms of probation that may affect the victim.

If the court proceeds with a revocation of probation in absentia, and the court finds that a violation has occurred, the court cannot proceed with sentencing until the probationer is present. (*See State v. Adler*, 189 Ariz. 280, 942 P.2d 439 (1997)).

When the summons is served on the probationer and they fail to appear at the initial appearance or arraignment, a warrant is ordered. (Note: *See* A.R.Cr.P., Rule 3.4 regarding what constitutes service.) A separate complaint for failure to appear may also be issued. Where service was attempted but was unsuccessful, and where there has been no contact and no current address is available, then the probation officer must appear personally before the judge, be sworn, and show good cause under oath why a warrant should issue.

If the probationer is arrested following an alleged violation of probation or a warrant for failure to appear at the revocation arraignment, the court should determine whether the probationer is bailable. Misdemeanants must have bail set. A.R.S. § 13-3961.01 creates a presumption of no bond for probationers convicted of a felony offense for which the person has received a sentence of imprisonment. (Note: *see* also A.R.Cr.P., Rule 7.2 (b)).

**F. Required Documentation for Adjudication of Domestic Violence Offenses**

Sentencing documents must clearly indicate that the person has been convicted of a domestic violence offense.

A Final Disposition Report (FDR) (*See Appendix A* for form) must be created for every person charged with a domestic violence offense. (A.R.S. § 41-1750(U.1)). A final disposition report is the information disclosing that criminal proceedings have been concluded and the nature of the disposition. Also, A.R.Cr.P. 37.1 requires that the final disposition of a criminal proceeding be reported to DPS.

The FDR is created when a person has been 10-print fingerprinted by a law enforcement agency. The court has the responsibility to order the defendant be fingerprinted if the court has reasonable cause to believe that the defendant has not previously been fingerprinted for the complaint. (A.R.S. § 41-1750(U.1)).

Courts should review the FDR in domestic violence cases to verify that Box 15 on Line A is marked with a “D” or an “X”. If Box 15 is not marked the court should check Box 16 on Line A indicating “amended” and repeat the required information on Line B adding the “D” or “X” in Box 15. FDRs must be sent to DPS within 40 days of adjudication.

For further information and updates on FDRs consult the current version of the *Disposition Reporting, A Practical Instruction Manual for Court Staff* located at the following web site:

<http://ajin/acap/Training/Documents/0900General/DPSManual.pdf>

## **Chapter XIV**

### **Offender Treatment Programs**

#### **A. Accountability**

Jurisdictions are increasingly requiring perpetrators of domestic violence to attend Offender Treatment Programs as a part of probation or pre-trial diversion. A wide array of programming options exists with significant differences in philosophy and practice. Understanding these differences is crucial to implementing an effective intervention in the criminal conduct of the perpetrator. A discerning approach requires that criminal justice personnel and the community of service providers consistently measure the efficacy of any decision or policy against two critical concepts:

##### **1. Victim Safety**

The victim's safety is the first and most significant priority, being served by our actions.

##### **2. Offender Accountability**

The batterer is being held accountable by the systems policies and by those involved in the intervention who are a part of the system. Suggested policies are contained in **Appendix I**.

A discussion of the use of gender specific pronouns is necessary to make the issue clear and to answer those persons who would object to identifying the victim as female and the perpetrator as male. The vast majority of literature on domestic violence, including the work of researchers funded by the Center for Disease Control and writers of the U.S. Department of Justice publication on batterer intervention, identifies perpetrators as male and victims as female to reflect the statistical reality. According to the National Institute of Justice 95% of batterers are male and 85% of victims are female. Of the small percentage of female perpetrators, a significant number are actually victims of domestic violence who have used violence to defend themselves, to retaliate in order to ward off further violence or to finally fight back. The use of gender-neutral language would be misleading and evasive and would prohibit an accurate understanding of who is committing the violence.

#### **B. Overview of Offender Treatment Programs**

Although there are a wide variety of offender treatment programs, they tend to have similar basic processes. The process begins with the intake and assessment procedure, followed by an orientation to rules and expectations, and often an introduction to underlying assumptions of the program. The batterer attends a series of weekly group meetings that focus on education, therapy or some combination of the two in order to identify the abusive behaviors, encourage the batterer to admit to the violence which caused his encounter with the court and to motivate the batterer to change.

Some treatment programs may have contact with the victim in order to make referrals for support and services and also to assess the batterer's progress through phone interviews with the partner. Other programs rely on probation or victim advocates to obtain information about the batterer's behavior toward the victim. Still others do not consider the victim's input important. Criteria for completion of the program may be as simple as having regular attendance or may include items such as a letter of responsibility or other indications of success. Programs may or may not offer follow-up services.

**1. Three Broad Categories of Treatment Philosophy:**

**a. The pro-feminist perspective:**

A point of analysis that highlights the major differences among these categories is the conceptualization of the "cause" of domestic violence. The pro-feminist approach suggests that because our society has inherited centuries of attitudes and beliefs shaped by an abiding assumption of the supremacy of men's power over women, the cause is located in the socialization of males and the continuing tolerance and support of men's violence. The treatment is focused on the confrontation and the re-education of the attitudes and beliefs that support this behavior. It is recognized in this approach that the treatment must be combined with a strong criminal justice response that communicates no tolerance for battering.

**b. The family systems approach:**

The family systems approach to domestic violence locates the problem in the functioning of the family system. It sees all members of the family as in some way contributing to the problem. It looks at the interaction between members as the problem and does not identify a perpetrator. The problem with this model is that it tends to blame the victim and encourage couples' counseling which is recognized as a source of danger to the victim at worst and ineffective at best as the victim often cannot freely disclose information for fear of retaliation. This approach is used less frequently and must be monitored closely to protect the victim from increased danger.

**c. A focus on individual pathology:**

The third approach locates the problem of abuse in the individual's psychological constitution. Personality disorders and traumatic childhood experiences are seen as the cause of the violence. A psycho dynamic approach or cognitive behavioral approach is used to intervene. A drawback of this perspective is that no psychological "type" has been identified to describe or explain the cause of the violence or to predict recidivism. Abusers' psychological characteristics range across the spectrum of personality characteristics, as is the case for non-abusers. Perhaps as a result,

the psychological approaches are moving toward the examination of cultural factors in addition to the psychological perspective.

## **2. Offender Treatment Programs Evolution**

Offender treatment programs have been evolving since the 1970's and benefit from the variety of perspectives and techniques employed. Today, there are fewer programs, which fit strictly into the categories listed above; rather, they blend approaches in order to draw from the strengths of each. Interestingly, the research has not been able to confirm that any one approach is more effective than another. Domestic violence advocates however, caution that any approach which does not include the analysis of power and control, leaves behind a crucial understanding of the dynamics of battering.

## **C. Efficacy of Offender Treatment Programs**

Currently the outcome of offender treatment programs is not well documented due to methodological problems, an inconsistent application of research design, and the obstacles created by having a highly mobile population for which follow-up is unlikely. Researchers and programs that concern themselves with outcomes gather data from the batterer, the victim when possible and from police reports. According to the National Institute for Justice, "Among the few [studies] considered methodologically sound, the majority have found modest but statistically significant reductions in recidivism among men participating in batterer interventions." Healy & Smith, (1998). Additionally, success rates are lower when women partners are reporting to the treatment programs, suggesting that when the outcome data relies solely on the batterer's reports, success is inflated.

The research focus on recidivism is problematic in assessing the success of a program, since a batterer may continue to abuse power and control in many ways in the relationship without the abuse coming to the attention of law enforcement. Women have reported that the batterer was able to continue to abuse her in a more sophisticated manner, which would escape the attention of police. Additionally, while batterers consistently under-report their abusive acts, their partners tend to be overly optimistic about the potential for the offender to change his attitudes and behavior. It is also difficult to assess the partner's degree of fear about reporting abusive behavior in order to have a more accurate picture of the offender's behavior. Research on offender treatment programs will require further development in design, methodology and a refined conceptualization of success before conclusions can be drawn about the efficacy of treatment programs.

## **D. Criteria of Success for Offender Treatment Programs, Edleson, (1995)**

### **1. Success Benchmarks**

- a. Violent behavior ends;
- b. Threats of violence, direct or indirect, end;

- c. Women and children involved are safe and feel safe;
- d. Use of manipulative behavior ends; and
- e. Egalitarian behavior in relationships increases.

## 2. Diagrams

### **A QUALITY OFFENDER TREATMENT PROGRAM WILL:**

- A.** *Be licensed and follow state standards.*
- B.** *Have regular contact with/report to courts.*
- C.** *Make victim safety the first priority.*
- D.** *Offender accountability follows.*
- E.** *Understand the power and control perspective.*
- F.** *Work in a community response system.*

### **A QUALITY OFFENDER TREATMENT PROGRAM WILL TEACH:**

- A.** *Awareness of the tactics of power and control.*
- B.** *That only the offenders are responsible for the behavior.*
- C.** *The victim is never the cause of his behavior.*
- D.** *No one deserves to be abused.*
- E.** *No one has the right to control another.*
- F.** *A partner is not property.*
- G.** *Abuse/battering is a conscious choice.*
- H.** *Abuse is a method of attaining power and control over another.*
- I.** *Abuse is not an anger control problem, an addiction problem or a mental illness. Healey et.al. 1998*

**OFFENDER TREATMENT SHOULD DO THE FOLLOWING:**

- A.** *Provide regular reports to probation and the courts, tracking who has enrollment, offender cooperation with program requirements, sobriety, and sentence compliance;*
  - B.** *Have contact with advocates for the victims of their clients and provide timely notification to the victim and probation - or any other appropriate agency - if a new threat to victim safety arises; Offender Treatment Program counselors have a duty to warn - A.R.S. § 36-517.02.*
  - C.** *Meet regularly with representatives of the domestic violence probation and prosecution units to discuss topics of mutual concern; and*
  - D.** *Meet regularly with representatives of independent battered women's programs to discuss topics of mutual concern.*
- Healey et.al. 1998**

**E. Criminal Justice System Response**

The authors of the National Institute of Justice publication state that the “combined impact of arrest, incarceration, adjudication, and intensive probation supervision may send a stronger message to the batterer about the seriousness of his behavior than what is taught in a batterer program.” (Healey, 1998). When Offender Treatment Programs are the only court-ordered sanction, it communicates to the batterer and to the community that the offense is not serious. Programs for the treatment of domestic violence offenders are only one aspect of an effective response. In fact, the moderate success of Offender Treatment Programs as reported may actually be due to the combined effect of the criminal justice response. Offender monitoring by the court, as a single factor, is shown to have a positive impact on recidivism. Also, judges' lectures from the bench have been effective in communicating the criminal nature of the actions as well as a strong social disapproval of acts of domestic violence. Two critical mistakes are made in the interest of “treating” the problem of domestic violence.

**1. Two Critical Mistakes**

**a. Ordering anger management**

Anger management is an inappropriate referral for domestic violence perpetrators as it ignores the larger dynamic of power and control, which is crucial to understanding the motivation for battering. Anger is only one of many tactics used by the batterer to control and intimidate the victim. The focus on anger also supports the myth that the batterer “lost control” during the battering incident. Decades of listening to the experience of victims tell us that the batterer most definitely chooses how, when, where and whom he batters. He will choose to strike places that can be covered by clothing, is careful to not batter in front of people who could intervene, and can compose himself quickly when police knock at the door. Anger management is a

narrow and dangerously incomplete perspective on the problem of domestic violence.

**b. Ordering couples' counseling**

Couples' counseling is so deleterious a response to domestic violence that 20 states have legislated against its use, including Arizona A.R.S. § 25-403(R). A victim's safety is critically compromised if she discloses the abuse in the presence of the offender. She is at high risk of retaliation especially if the batterer feels exposed and embarrassed. If a no-contact order has been issued, couples' counseling provides an avenue for a violation of that order. Also the fact that a therapist is treating both the victim and perpetrator implies that both are responsible for the violence. This reinforces the accusations by the abuser that the violence is the victim's fault. Also, many practitioners now recognize that by agreeing to provide services to the couple, they are in some way condoning or encouraging a woman to stay in a dangerous situation. Both anger management and couples' counseling are misguided and dangerous attempts to intervene in domestic violence.

**2. Substance Abuse Treatment**

Where indicated, substance abuse treatment is crucial. Programs are most effective, however, when the treatment for substance abuse occurs separately from the treatment for domestic violence.

For the Offender Treatment Program to work effectively, entry into the program must occur soon after the offense. In fact, the length of time between the domestic violence event and enrollment may be an important predictor of recidivism. If the offender enters an Offender Treatment Program while the event is still fresh, he may experience remorse and his defenses and denial are less entrenched. If a month or more passes, the details of the offender's behavior fade and the event is less pertinent to the treatment. Experienced facilitators suggest that, over time, minimization and justification of the offender's violent behavior will increasingly characterize the batterer's interpretation of the events that led to his appearance in court.

At a CIDVC presentation December 11, 2002, a panel of domestic violence experts said that program drop-out rate is a significant predictor of re-offense. Since program dropout rate is significantly higher when the mandate to attend an Offender Treatment Program is not backed by court-ordered sanctions, the lack of court-ordered sanctions is positively related to re-assault. Supervised probation, regular communication between program staff and court representatives, followed by a swift forceful response to non-compliance or re-offense is essential to any possibility of success.

With respect to repeat offenders, before a Judicial Officer imposes a second opportunity to attend an Offender Treatment Program, the Judicial Officer should strongly consider imposing a jail sanction. "Unfortunately in Maricopa County when the offender is convicted

of a domestic violence misdemeanor, he frequently receives a sentence of summary probation, which is probation in name only,” MAG Regional Domestic Violence Plan August (1999). “A strong and systemic judicial intervention and a victim-based mode of support prove to be a more efficient means of achieving the prime objective of any intervention aimed at the perpetrator.” Montreal Men Against Sexism.

CIDVC recommends that offenders be sent to an offender treatment program that is at least 26 weeks and encourages judicial officers to collaborate with the offender treatment counselors or probation officer. The group which formulated the recommendations (**Appendix I**) have the information on the offender and best possible sanctions and can advise the judge. Recommendations are based on current research.

To increase the possibilities for the success of Offender Treatment Programs, offenders should be matched with culturally appropriate programs geared to ethnic identity, gender, race, sexual orientation, and socio-economic subcultures. Additionally, high-risk offenders or those scoring high on lethality assessments require a more intensive intervention, where available. Intensive programs meet three or more times a week and include a higher level of monitoring.

Many Offender Treatment Programs recognize the need to provide an entirely different curriculum for women charged with domestic violence. The motivation for violence by women may be very different from the motivation in men. Facilitators recognize that the majority of women who use violence have been victims themselves and unlike the male batterer whose pattern of abuse is typified by the need for power and control over the victim, women who use violence may be motivated by the need to stop their partner’s violence.

According to Nancy Grigsby, a facilitator of groups for women convicted of domestic violence, the majority of women they see were involved with an abusive partner at the time of the incident or have had significant abuse in their past. They have used violence in response to the battering incident in self-defense, or as a tactic to de-escalate the tension they feel in their partner, knowing that an abusive event is imminent and inevitable. They know it's coming and they want to get it over, rather than live in a state of prolonged tension and anxiety or even terror. The portion of women who could be truly characterized as the primary aggressor is minimal. Grigsby says it is essential to focus first on how to help the women achieve safety in their homes; "If they are safe, they don't resort to violence."

Contrary to the assumption that Offender Treatment Programs will hold the answers to the problem of domestic violence, the preponderance of predictors of recidivism are in the hands of those in the criminal justice process. The court system is clearly central to solutions for domestic violence.

Contact the Arizona Department of Health Services or the Arizona Coalition Against Domestic Violence for recommendations for Offender Treatment Programs that are compliant with state standards as well as having demonstrated a practice that prioritizes victim safety, offender accountability, and coordination with the court system.

## References

Garrity, R.(1995). *New York State Coalition Against Domestic Violence*.

Grigsby, N. (2001). Presentation at the 6th International Conference on Family Violence, San Diego, CA *Females who are Violent: Research, Assessment, and Intervention*.

Healey, K., Smith, C., O'Sullivan, C. (1998). *Batterer Intervention: Program Approaches and Criminal Justice Strategies*. U.S. Department of Justice, Office of Justice Programs and National Institute of Justice.

Healey, K. Smith, C. (1998). *Batterer programs: What criminal justice agencies need to know*. U.S. Department of Justice, Office of Justice Programs and National Institute of Justice.

*MAG Regional Domestic Violence Plan*. August (1999). Maricopa Association of Governments.

Montreal Men Against Sexism, (1995). *Limits and risks of programs for wife batterers*. MINCAVA Electronic Clearing House.

## **Appendix A**

### **Checklist for Criminal DV Cases**

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#### **Fingerprinting**

- ☐ 10 Print Finger Print if not already printed

#### **If a plea of guilty or no contest**

- ☐ Waiver of counsel or counsel present (cannot sentence to jail unless offered free lawyer)

#### **Guilty/No Contest Plea proceeding form**

- ☐ Finding that the defendant and victim have a relationship as defined in 13-3601A

#### **Judgment form for either finding of guilt after trial or result of a plea containing the following:**

- ☐ Convicted of a DV crime in 13-3601A
- ☐ Victim and defendant have a relationship as defined in 13-3601A and indicate victims name
- ☐ Contain written warning required by statute
- ☐ Warning of Prohibition for possession of firearms under Lautenberg (If applicable)
- ☐ Order defendant to mandatory DV counseling - on judgment form
- ☐ Affix single print of defendant to judgment form, for identification purposes

#### **FDR/Disposition Form**

- ☐ Verify DV indicated by charge, if not add DV and place a check in the amendment box
- ☐ Complete the rest of the form
- ☐ Mail form to DPS

#### **Monitoring**

- ☐ Ensure that defendant complies with all terms of judgment

1] SID NUMBER  
AZ



ARIZONA DEPARTMENT OF PUBLIC SAFETY  
**DISPOSITION REPORT**

Mail to: Criminal History Records  
AZ Department of Public Safety  
P O Box 18450  
Phoenix AZ 85005-8450

2] NAME (Last, First, Middle)  
3] DATE OF BIRTH (MM) / (DD) / (CCYY)  
4] DATE OF ARREST (MM) / (DD) / (CCYY)  
5] PCN  
6] ARRESTING AGENCY ORI  
7] ARRESTING AGENCY CASE NO.  
8] BOOKING AGENCY ORI  
9] BOOKING NUMBER

10] CHARGES / AMENDED CHARGES <small>CHARGES: Please write literal If more than three (3) charges list on second (2nd) form. LAW ENFORCEMENT AGENCY: Fill in original charge(s) on line(s) 1a, 2a, etc. PROSECUTOR / COURT: Fill in amended charge(s) on line(s) 1b, 2b, etc.</small>	11] ARIZONA REVISED STATUTE OR ORDINANCE	12] DATE OF OFFENSE / VIOLATION	13] OFFENSE TYPE	14] PREPARATORY OFFENSE	15] DOMESTIC VIOLENCE & VICTIM INFO	16] DESIGNATED COURT NAME / IDENTIFIER	17] AMENDED TO (X)	18] DISPOSITION CODE	19] PRISON OR JAIL	20] LENGTH OF CONFINEMENT (da, mo, yr)	21] SENTENCE CODE	22] PROBATION LENGTH (da, mo, yr)	23] FINE YES OR NO	24] COURT CASE / COMPLAINT NUMBER	25] DISPOSITION DATE	26] AGENCY ORI MAKING DISPOSITION DECISION
1a			M F						P J				Y N			
1b			M F						P J				Y N			
2a			M F						P J				Y N			
2b			M F						P J				Y N			
3a			M F						P J				Y N			
3b			M F						P J				Y N			

27] FURTHER EXPLANATIONS OR MODIFICATIONS  
28] RIGHT INDEX FINGERPRINT

**DISPOSITION REPORT**

A Disposition Report is required from the disposition agency (arrest, prosecutor or court) pursuant to the AZ Rules of Criminal Procedure (Rule 37) for each person fingerprinted for a reportable crime pursuant to ARS §41-1750.

Please call DPS Criminal History Records  
(602) 223-2222 for assistance with this form.

14] PREPARATORY  
OFFENSE  
CODES

A - Attempted  
C - Conspiracy to commit  
F - Facilitate  
S - Solicit

15] DOMESTIC VIOLENCE  
OR VICTIM  
INFORMATION CODES

D - Crime involves domestic violence  
M - Victim is a minor  
A - Victim is a vulnerable Adult  
L - Victim is a law enforcement officer  
C - Dangerous crimes against children

18] DISPOSITION CODES

AC - Acquitted / Not guilty  
CD - Court Dismissed  
DP - Deferred Prosecution  
DS - Deferred Sentencing  
GG - Guilty  
GI - Guilty but Insane  
NF - No complaint filed  
NP - Nollo Contendre plea  
NR - Not referred for prosecution  
PD - Pardoned  
PM - Pending due to mental incompetency  
PO - Plea to other charges  
RI - Not responsible by reason of insanity

APPELLATE CODES

AF - Affirmed  
AR - Affirmed, Remanded for Re-sentencing  
RR - Reversed and Remanded  
RV - Reversed and Conviction Overturned  
SM - Sentence Modified

21] SENTENCE CODES

CC - Concurrent  
CS - Consecutive  
PS - Public or Community Service  
SS - Court Suspended Sentence

## DISPOSITION REPORT - COMPLETION INSTRUCTIONS

1. **SID NUMBER/AZ:** If subject was previously arrested, the State Identification number may be obtained from the Arizona Computerized Criminal History (ACCH) file via terminal inquiry.

2. **NAME:** Subject's complete name as shown on the arrest fingerprint card which was completed for this arrest.

3. **DATE OF BIRTH (DOB):** As shown on the arrest fingerprint card (MMDDCCYY)  
(MM = month, DD = day, CCYY = full year; example 03/20/1954).

4. **DATE OF ARREST:** Enter the date of arrest (MMDDCCYY).

5. **PCN:** Processing control number (PCN) assigned for specific arrest incident via the AZAFIS system.

6. **ARRESTING AGENCY ORI NUMBER:** The NCIC-assigned originating agency identifier (ORI) number.

7. **ARRESTING AGENCY CASE NUMBER:** The arresting agency's case number.

8. **BOOKING AGENCY ORI NUMBER:** The NCIC-assigned originating agency identifier (ORI) number.

9. **BOOKING NUMBER:** The number assigned by the detention facility.

10. **CHARGES:** Each offense charged at the time of arrest **MUST** be listed on Line "a". Line "b" is used only for subsequent amendment to the initial arrest charge(s).

11. **ARIZONA REVISED STATUTE:** Enter the correct Arizona Revised Statute (ARS) number or the County/City Ordinance number for each charge (as indicated on the arrest fingerprint card).

12. **DATE OF OFFENSE / VIOLATION:** Enter the date of the offense / violation (MMDDCCYY).

13. **OFFENSE TYPE:** Circle "M" for misdemeanor  
Circle "F" for felony

14. **PREPARATORY OFFENSE CODE:** Enter the appropriate code from the list on the front of this form.

15. **DOMESTIC VIOLENCE & VICTIM INFORMATION CODE:** Enter the appropriate code from the list on the front of this form.

16. **DESIGNATED COURT NAME / IDENTIFIER:** Enter the designated court name or NCIC assigned originating agency identifier (ORI) for each charge.

17. **AMENDED TO:** Enter the letter "X" in box 17, line "a"; then write amended charge(s) and sentence information on the corresponding "b" line, beginning in box 10, completing all applicable boxes through to box 27.

18. **DISPOSITION CODE:** Enter the appropriate disposition or appellate code from the list on the front of this form.

19. **PRISON/JAIL:** If the subject was confined: Circle "P" for Prison OR Circle "J" for Jail.

20. **LENGTH OF CONFINEMENT:** Indicate the length of confinement (in days, months, years, etc.), to which the subject is sentenced. Example: 1 yr./2 mo.

21. **SENTENCE CODE:** Enter the appropriate sentence code from the list on the front of this form.

22. **PROBATION LENGTH:** Indicate the length of probation (in days, months, years, etc.,) to which the subject is sentenced. Example: 3 yr.

23. **FINE:** Circle "Y" for Yes, to indicate that a fine was imposed.  
Circle "N" for No, to indicate there was no fine imposed.

24. **COURT CASE / COMPLAINT NUMBER:** The case or complaint number assigned by the Court.

25. **DISPOSITION DATE:** Enter the official disposition date (MMDDCCYY).

26. **AGENCY ORI MAKING DISPOSITION DECISION:** The NCIC-assigned originating agency identifier (ORI) of the agency making the disposition decision.

27. **FURTHER EXPLANATIONS OR MODIFICATIONS:** Further explanation regarding a particular charge/disposition (list the charge number) may be entered in this section.

28. **INDEX FINGERPRINT:** (lower right corner of this form) At the time of arrest/fingerprinting, the subject's right index fingerprint may be placed in this box.

## GENERAL INSTRUCTIONS

A. **ARRESTING AGENCY MUST** submit two (2) complete fingerprint arrest cards to the Department of Public Safety, Criminal History Records (CHRU) in order for this disposition to be processed. The arresting agency must fill in all of the arrest data. If the arrest is disposed of by the arresting agency, as where the subject is not referred for prosecution, THEN the arresting agency must fill in the Disposition Report and mail this report to DPS. In the event the case goes to the prosecutor, this report must be forwarded to the prosecutor with the subject's file.

B. **PROSECUTOR MUST** complete the Disposition Report to show the disposition at the prosecutorial level, if the matter is not being forwarded to the court for action. Thereafter submit the Disposition Report directly to DPS. If court action is required, the prosecutor must forward this the Disposition Report report with the case file to the court having jurisdiction.

C. **COURT MUST** place its case or complaint number in box 24 and on the line corresponding to the charge. The court determines the disposition of the offense and notes it on the Disposition Report after the subject's court appearance. NOTE: After insuring that Boxes 10 and 11 have been filled out, and Boxes 12-26 as appropriate, the Disposition Report is forwarded to DPS.

APPELLATE COURT MUST complete the Disposition Report when applicable. Modification of conviction or sentence should be indicated on "Line b" for EACH count.

D. **SPLIT CHARGES:** If there is more than one charge and the disposition for each charge is to be made in different courts, it will be necessary for the law enforcement agency or the prosecutor to submit the original Disposition Report to one court and a LEGIBLE photocopy of the Disposition Report to the other court.

1] SID NUMBER  
AZ



ARIZONA DEPARTMENT OF PUBLIC SAFETY  
**DISPOSITION REPORT SUPPLEMENTAL**

**Mail to:** Criminal History Records  
AZ Department of Public Safety  
P O Box 18450  
Phoenix AZ 85005-8450

2] NAME (Last, First, Middle)					3] DATE OF BIRTH (MM) / (DD) / (CCYY)			4] DATE OF ARREST (MM) / (DD) / (CCYY)			5] PCN																
6] ARRESTING AGENCY ORI			7] ARRESTING AGENCY CASE NO.			8] BOOKING AGENCY ORI			9] BOOKING NUMBER																		
10] CHARGES / AMENDED CHARGES											11]	12]	13]	14]	15]	16]	17]	18]	19]	20]	21]	22]	23]	24]	25]	26]	
<b>CHARGES:</b> Please write literal If more than five (5) charges list on second (2nd) form. <b>LAW ENFORCEMENT AGENCY:</b> Fill in original charge(s) on line(s) a. <b>PROSECUTOR / COURT:</b> Fill in amended charge(s) on line(s) b.											ARIZONA REVISED STATUTE OR ORDINANCE	DATE OF OFFENSE / VIOLATION	OFFENSE TYPE	PREPARATORY OFFENSE	DOMESTIC VIOLENCE & VICTIM INFO	DESIGNATED COURT NAME / IDENTIFIER	AMENDED TO (X)	DISPOSITION CODE	PRISON OR JAIL	LENGTH OF CONFINEMENT (da, mo, yr)	SENTENCE CODE	PROBATION LENGTH (da, mo, yr)	FINE YES OR NO	COURT CASE / COMPLAINT NUMBER	DISPOSITION DATE	AGENCY ORI MAKING DISPOSITION DECISION	
a													M F							P J					Y N		
b													M F							P J					Y N		
a													M F							P J					Y N		
b													M F							P J					Y N		
a													M F							P J					Y N		
b													M F							P J					Y N		
a													M F							P J					Y N		
b													MF							P J					Y N		
a													MF							P J					Y N		
b													M F							P J					Y N		

## Appendix B

### Scripts

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#### A. SENTENCING

1. This is the time set for sentencing in CR \_\_\_\_\_.
2. Counsel, please announce for the record.
3. To the defendant:
  - a. Please state your name for the court.
  - b. What is your date of birth?
  - c. Based upon a prior finding of this court, IT IS THE JUDGMENT OF THIS COURT that the defendant is guilty of \_\_\_\_\_.
  - d. This offense is a non-dangerous, non-repetitive offense under the criminal code.
  - e. I have read and considered the presentence report dated \_\_\_\_\_ and its recommendation. I have also considered:
    - i. The stipulation of the parties.
    - ii. The letters received from \_\_\_\_\_.
    - iii. The evidence presented at trial/hearing.
    - iv. The Victim Impact Statement.
  - f. Does the state wish to be heard?
  - g. Are there any victims present? Do you wish to be heard?
  - h. To defense counsel: Do you wish to be heard?
  - i. To defendant: Do you wish to say anything to the court at this time?

#### B. PROBATION:

1. It is the judgment of the court that imposition of sentence is suspended and the Defendant is placed on (supervised/intensive) probation for (months/years) to date from \_\_\_\_\_.
2. Make sure all blanks are filled in, for example: a. Start of date of probation, b. Start date for payment of fees. Be sure to sign and date the judgment.

3. I will not read the general terms of your probation. I will point out the special terms of your probation. Please read the terms and conditions of your probation carefully. You must follow your terms and conditions of probation or you could be brought back before this court and have your probation revoked and sentenced to prison.
4. (IF A PLEA) You have the right to petition the court for post conviction relief from the orders of the court and to have a lawyer represent you in those proceedings. If you want to file a petition for post conviction relief, you must do so within 90 days from today or you lose the right to relief.
5. You must sign a copy of your rights to review and your conditions of probation. You must also provide thumb print to the bailiff. Domestic Violence convictions require a full set of fingerprints.
6. Bond: It is further ordered exonerated any bond.
7. Report to the Probation Office today; you are remanded at this time to begin your jail term; you are released from custody on this case. Report to the Probation Office today.
8. The court must make sure that the defendant affixes a fingerprint on the forms signifying the conviction for a domestic violence offense. This fingerprint may be used to prove a conviction or convictions in future domestic violence cases.

**C. DISMISSAL**

On motion of the state, the matters set forth in the plea agreement for dismissal are ordered dismissed.

## Appendix C

Arizona Supreme Court  
Judicial Ethics Advisory Committee

Opinion 97-11  
September 24, 1997

### USE OF POLICE REPORT PRIOR TO ADMISSION INTO EVIDENCE

#### ISSUES

1. Is it ethically improper for a court to serve as a repository and conduit of sealed police reports which may be used in pending or prospective DUI criminal and civil traffic cases in that court?  
**Answer:** No.

2. Is it ethically improper for a judge in such a case to review and consider information in a police report while a case is pending, when the report has not been admitted into evidence in the case? **Answer:** Yes, except in connection with pretrial motions or in connection with sentencing after a determination of guilt (in the DUI context) or responsibility (in the civil traffic context) has been made.

#### FACTS

A justice court routinely receives from police officers copies of police reports, in sealed envelopes, accompanied by the corresponding citations. If the defendant enters a “not guilty” plea, the report is forwarded to the prosecutor along with the court order setting a trial date. If the defendant enters a “guilty” plea, the police report remains sealed and with the court file in the case.

Two examples are cited of how the court reviews and utilizes information contained in the police report. First, at the time of sentencing following a defendant’s guilty plea in a DUI case, the judge reviews the police report for any mitigating or aggravating circumstances and furnishes a copy to the defendant to review. Typically the defendant is *pro per* and no prosecutor is present to make sentencing recommendations. Sentencing is the first time either the defendant or the judge has seen the police report, which may contain information on

such topics as whether the defendant was cooperative with the police during the arrest, whether other people were involved, whether the defendant had prior contact with the police, whether an accident was involved and, if so, the nature and extent of any damage. The judge uses such information in determining whether to impose the mandatory minimum sentence or a harsher sentence.

The second example involves cases where a defendant has been cited for a civil traffic violation involving an accident and seeks to attend defensive driving school in order to have the charge dismissed. In such cases, the judge reviews the police report to see if the accident resulted in death or any serious physical injuries that would eliminate defensive driving school as an option.

#### DISCUSSION

##### Issue 1

The administrative procedure by which the court serves as repository and conduit of sealed police reports does not violate ethical standards. The police reports are furnished to the court in sealed envelopes and remain sealed until use at trial or sentencing. According to the court, in cases of “not guilty” pleas, the procedure has been an efficient and timely method of transmitting the police report to the prosecutor, who then can make the report available to the defendant.

There is nothing improper in the judiciary and law enforcement cooperating in this manner. *See* Opinion 95-15 (court may cooperate with police in sending letters to persons with outstanding arrest warrants).

Any arguable concerns about appearance of impropriety, impartiality, or judicial independence relating to this purely administrative procedure do not compare to those addressed in Opinions 85-1 (Issue 2) (improper for judge to hear criminal cases when judge's secretary is county sheriff's wife), 94-3 (improper for JP to serve as member of sheriff's posse), or 96-1 (improper for court to sign verifications of city police overtime records). The procedure involved here does not under-mine the court's impartiality or appearance of propriety (Canon 2A), nor does it impair the judiciary's integrity or independence. (Canon 1).

## Issue 2

There do not appear to be any Arizona Ethics advisory opinions or any out-of-state opinions specifically dealing with this issue, which implicates several provisions in the Code of Judicial Conduct. Canon 2A requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3B(5) obligates a judge to "perform judicial duties without bias or prejudice." Canon 3B(7) provides in pertinent part:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

The commentary to Canon 3B(7) states "[t]he proscription against communications concerning a proceeding includes communications from . . . persons who are not participants in the

proceeding, except to the limited extent permitted." The commentary further provides that "[t]o the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge," and that "[w]henever presence of a party or notice to a party is required by Section 3B(7)," the party must be present or be given notice if he or she is unrepresented. Finally, the commentary states that "[e]xcept as provided by law, a judge must not independently investigate facts in a case and must consider only the evidence presented."

In our view, a judge's review of police reports not offered as evidence constitutes "*ex parte* communications" for purposes of Canon 3B(7). Like *ex parte*, direct contact with a reporting officer, a police report furnishes information to the judge that may influence his or her view of the defendant and the case. Our supreme court has described a judge's "repeated use of a bench side telephone for *ex parte* contact with, among others, arresting officers in criminal cases, to assist him with the resolution of matters before him" as "highly improper" and "serious judicial misconduct." *In re Anderson*, 168 Ariz. 432, 436, 814 P.2d 773, 777 (1991). Police reports are public records which are available for inspection and copying by any person. A.R.S. §§ 39- 121, 39-121.01; *Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984). Because of their public nature and availability, police reports do not constitute the same type of *ex parte* communications condemned in *Anderson*. Nonetheless, a judge's *ex parte* review and consideration of a police report which has not been properly introduced in a pretrial proceeding or admitted into evidence, before any determination of guilt and before sentencing, violates Canon 3B(7).

Such pre-sentencing use of police reports also implicates other ethical concerns under Canon 2A and Canon 3B(5). Of course, there is no ethical impropriety in a court reviewing and considering information in a police report after it has been properly introduced in a pretrial proceeding or admitted into evidence at trial. In contrast, it would be improper for a judge sitting as trier of fact in a bench trial to review and consider a police report which had not been properly introduced in a pretrial proceeding or admitted into evidence because “facts are to be determined on the basis of evidence presented in court within the adversary process so that each side can present its version of the facts.” Jeffrey L. Shaman, *et al. Judicial Conduct and Ethics*, § 4.10, at 113. Moreover, even where a judge is not sitting as a fact-finder, he or she should not obtain extrajudicial knowledge of facts, “because that knowledge could un-fairly influence the judge’s rulings and other actions in the case.” *Id.*

Use of police reports strictly for sentencing purposes, on the other hand, does not violate the Code. *Ex parte* review or use of a police report “concerning a pending or impending proceeding” is prohibited unless one of the five exceptions under Canon 3B(7) applies. One of the exceptions permits a judge to “initiate or consider any *ex parte* communications when expressly authorized to do so.” Section 3B(7)(e). As defined in the terminology section of the code, the term “law” denotes “court rules as well as statutes, constitutional provisions and decisional law.” In Arizona, a court may consider police reports before entering a judgment of guilt against a criminal defendant. A.R.Cr.P. 26.2(c), 17 A.R.S. Therefore, so long as the defendant is furnished with a copy of the police report and given reasonable time and opportunity to respond to information contained therein, a judge may ethically review and consider information in the report for sentencing purposes after a determination of guilt or guilty plea in the DUI

context, or for disposition purposes after a determination of responsibility in the civil traffic context. Under those circumstances, such use of the report at sentencing for informational aggravation or mitigation purposes does not violate the provisions of Canon 2 or 3.

## REFERENCES

A.R.S. §§ 39-121, 39-121.01 *In re Anderson*, 168 Ariz. 432, 814 P.2d 773 (1991).  
*Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984).  
Arizona Rules Criminal Procedure, 26.2(c), 17  
A.R.S. Arizona Code of Judicial Conduct, Canons 2A, 3B(5) and (7) (1993).  
Arizona Judicial Ethics Advisory Committee, Opinions 85-1 (1985); 94-3 (February 18, 1994); 95-15 (August 3, 1995); 96-1 (February 23, 1996).  
Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* (2d ed. 1995).

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to Rule 82 of the Rules of the Supreme Court. For further information, contact the Judicial Ethics Advisory Committee, 1501 W. Washington Street, Suite 229, Phoenix, Arizona 85007.

## Appendix D

Arizona Supreme Court  
Judicial Ethics Advisory Committee

Opinion 99-3  
July 23, 1999

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### USE OF POLICE REPORT FOR PRETRIAL RELEASE DETERMINATION Clarification of Opinion 97-11

#### ISSUES

Is it ethically improper for a judge to review and consider information contained in a police report or release questionnaire in determining pretrial conditions of release of an in-custody defendant and in determining whether to appoint a public defender in a particular case? **Answer:** No.

#### FACTS

Judges in a municipal court routinely see in-custody defendants for initial appearances or arraignments without prosecutors present. At that court appearance, judges sometimes consider police reports in deciding conditions of release and whether to appoint a public defender in a particular case. In addition, judges usually consider information concerning circumstances of the offense and the arrest contained in a release questionnaire, which is completed in part by police and in part by the defendant. Judges also often ask the defendants whether they have anything to add to the information in the questionnaire.

#### DISCUSSION

This inquiry was prompted by Opinion 97-11, which addressed, *inter alia*, courts' use of a police report in a pending case when the report has not been admitted into evidence in that case. In response to the second issue in that opinion, we stated that courts generally should not review and consider information in un-admitted police reports except in connection with pretrial motions or for sentencing purposes. We further stated that "a judge's *ex parte* review and consideration of a

police report which has not been properly introduced in a pretrial proceeding or admitted into evidence, before any determination of guilt and before sentencing, violates Canon 3B(7) of the Code of Judicial Conduct." We went on to recognize, however, that Canon 3B(7)(e) permits a judge to "initiate or consider any *ex parte* communications when expressly authorized by law to do so." We further noted that the term "law" denotes "court rules as well as statutes, constitutional provisions and decisional law."

The exception provided by Canon 3B(7)(e) applies to the issue raised here. Whether the defendant is separately arraigned under the Arizona Rules of Criminal Procedure ("Rule"), Rule 14 or in conjunction with the initial appearance under Rule 4 the judge must determine the conditions of release pursuant to Rule 7. *See* A.R.Cr.P. 4.2(a)(6), 14.3(b). Pursuant to Rule 7.4(c), release determinations "may be based on evidence not admissible under the rules of evidence." In addition, A.R.S. § 13-3967(C) provides, in part: "In determining the method of release or the amount of bail, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of evidence against the accused," and other prescribed factors. Thus, judges have broad latitude, and in fact are required, to consider any "available information" for evaluating the various factors in making release and bail determinations. The "available information" may include police reports, and "[i]nformation stated or

offered in connection with any order pursuant to [§ 13 - 3967(C)] need not conform to the rules pertaining to admissibility of evidence in a court of law.” A.R.S. § 13- 3967(H).

To assist the court in fulfilling its duty under A.R.S. § 13-3967(C), our supreme court has approved and adopted a “Release Questionnaire.” *See* A.R.Cr.P., Form 4. A court’s reference to the police report may be useful or necessary for the purpose of supplementing or clarifying information contained in that questionnaire. Therefore, it is not unethical for a judge to refer to a police report at the initial appearance or arraignment stage for the limited purpose of supplementing the release questionnaire and for determining conditions of release, amount of bail, and appointment of counsel. Rather, such use of police reports falls within the exception of Canon 3B(7)(e) because it is “expressly authorized by law.” *See San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, 977 P. 2d 790 (1999). Opinion 97-11 was neither intended, nor should it be construed, to suggest otherwise.

## REFERENCES

Arizona Revised Statutes §§ 13-3967(C) and (H). *San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, 977 P.2d 790, 294 Ariz. Adv. Rep. 15 (1999).

Arizona Rules of Criminal Procedure, 4, 4.2(a)(6), 7, 7.4(c), 14, and 14.3(b).

Arizona Code of Judicial Conduct, Canons 3B(7) and 3B(7)(e) (1993).

Arizona Judicial Ethics Advisory Committee, Opinion 97-11 (September 24, 1997).

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion, pursuant to Rule 82 of the Rules of the Supreme Court. For further information, contact the Judicial Ethics Advisory Committee, 1501 W. Washington Street, Suite 229, Phoenix, Arizona 85007.

## Appendix E

### **After the Plea: What Works with Domestic Violence Offenders?**

By Anne L. Gainey, PhD

Dr. Gainey is a therapist in Seattle, Washington and a consultant on domestic violence issues. She is on the faculty of the University of Washington in Seattle and has made national presentations on domestic violence issues since 1978. She has written extensively on the topic of domestic violence. This article is reprinted with permission of the author.

Violence against wives or female intimates has long been tolerated and even condoned by our social norms and institutions. This violence has been viewed as a private family matter that, if left alone, will be resolved without intervention.

Domestic violence is embedded in the customs of people and social institutions and stopping it requires changing both behaviors and belief systems. Such change does not occur quickly. Perpetrators are more likely to change when they have multiple experiences of being held accountable. It is not arrest alone, or prosecution alone, or conviction alone, or counseling alone that brings about change. It is a combination of these experiences. Domestic violence is learned through multiple experiences and stopping it requires multiple experiences.

Experts in treating domestic violence offenders have found that domestic violence results in the defendant exercising power and control over the victim. (*See A. Gainey (1987) In D. Sonkin, Ed. Perpetrators of Domestic Violence: Counseling the Court Mandated Client in Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence New York: Springer, 218-248.*)

Violence provides a very effective, short-term method of maintaining this control. Domestic violence perpetrators have learned that violence coupled with the threat of violence is an effective way of getting the victim to engage in those behaviors deemed essential by the perpetrator, and thus is an effective way of maintaining power and control over the victim.

Domestic violence offenders have learned in their family of origin or in their communities that violent behavior affords the violent individual the ultimate power within the family. This message is reinforced by society, and by the failure of our institutions to intervene or to condemn this violence. The court can counteract the belief that violence is an acceptable means of maintaining power and control by imposing negative consequences in the form of legal sanctions upon the behavior.

Perpetrators of domestic violence have a cluster of behaviors and belief systems that impede their ability to change their behavior. They tend to minimize or deny the seriousness of their violence, to rationalize their violence by blaming others (especially their victims) for their behavior, and to be externally motivated. This is seen in statements such as, "I couldn't help it, she pushed my buttons." "I had an argument with my boss." "I was drunk." Society often colludes with the offender's minimization, externalization, and rationalization by denying the seriousness of the violence, or by focusing blame on the victim with questions such as, "What did she do to make him so angry?"

**Any intervention by the court directed at offenders must do the following:**

- A. Confront their minimization, rationalization, and denial of responsibility for the behavior.**
- B. Provide external motivators for change through clear consequences.**
- C. Confront the belief that violence is an acceptable means of maintaining power and control.**
- D. Be consistent over time.**

Traditionally the community has looked to the victim to be the consistent motivator that the perpetrator needs to change. Too often we tell victims just to leave the situation or to stand up for themselves, to protect the children from the batterer, or to go to marriage counseling, etc. We give this advice in the hope that somehow these actions will provide the consistent motivator the perpetrator needs to make changes. Expecting the victim to provide this consistent motivation for change not only puts her/him in further danger, but it ignores the reality that victims of this type of crime are in severe crisis and may be unable to be consistent. Instead of expecting the victim to be the consistent motivator for the perpetrator, the community, through the criminal justice system, must play that role.

The criminal justice system plays a critical role in addressing the offender's minimization and externalization of the violence. It can provide the offender with external motivation for stopping the violence by imposing a variety of sanctions which:

- A. Hold the perpetrator and not the victim accountable for the domestic violence.**
- B. Hold the perpetrator accountable for making the necessary changes to stop all types of battering.**
- C. Provide clear and consistent consequences for failing to follow through with court mandates, or for continuing the abusive behavior.**

To maximize their effectiveness, dispositions should provide multiple ways to convey the message that domestic violence is never justified and that it is always the responsibility of the perpetrator to change that behavior. This may be done through a combination of jail time, restitution, community service, fines, restriction on access to the victim, and court-ordered counseling. It is the consistency and repetition of the message in multiple ways with clear sanctions that changes perpetrators of domestic violence

**Appendix F**  
**Arizona Administrative Code**  
**Title 9**  
**Chapter 20**

**ARTICLE 11. MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT**

**R9-20-1101. Misdemeanor Domestic Violence Offender Treatment Standards**

- A. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall ensure that:
1. The agency's program description includes, in addition to the items listed in R9-20-201(A)(2), the agency's method for providing misdemeanor domestic violence offender treatment.
  2. The agency's method for providing misdemeanor domestic violence offender treatment:
    - a. Is professionally recognized treatment for which supportive research results have been published within the five years before the date of application for an initial or renewal license;
    - b. Does not disproportionately or exclusively include one or more of the following:
      - i. Anger or stress management,
      - ii. Conflict resolution,
      - iii. Family counseling, or
      - iv. Education or information about domestic violence;
    - c. Emphasizes personal responsibility;
    - d. Identifies domestic violence as a means of asserting power and control over another individual;
    - e. Does not require the participation of a victim of domestic violence;
    - f. Includes individual counseling, group counseling, or a combination of individual counseling according to the requirements in R9-20-302; and
    - g. Does not include more than 15 clients in group counseling; and

3. Misdemeanor domestic violence offender treatment is not provided at a location where a victim of domestic violence is sheltered; and
  4. Misdemeanor domestic violence treatment for a client is scheduled to be completed within not less than four months and not more than 12 months after the client is admitted into misdemeanor domestic violence treatment.
- B. A licensee of an agency that provides misdemeanor domestic violence shall ensure that policies and procedures are developed, implemented, and complied with that.:
1. Require a client to complete misdemeanor domestic violence treatment not less than four months or more than 12 months after the date the client is admitted into misdemeanor violence treatment, unless the agency extends the time for completion of the misdemeanor domestic violence treatment;
  2. Establish criteria the agency considers when determining whether to extend the time for a client's completion of misdemeanor domestic violence treatment, such as an occurrence of one of the following during the 12 months after the date the client is admitted to misdemeanor violence treatment:
    - a. A client serving jail time,
    - b. Illness of a client or a family member of the client,
    - c. Death of a family member, and
    - d. The court requiring the client to complete more than 52 sessions of misdemeanor domestic violence treatment.
- C. Misdemeanor domestic violence treatment shall include, at a minimum, the following number of sessions, to be completed after the applicable offense for which the client was required to complete misdemeanor violence treatment:
1. For a first offense, 26 sessions;
  2. For a second offense, 36 hours; and
  3. For a third offense or any subsequent offense, 52 hours,
- D. The duration of a session in subsection (C) shall be:
1. For an individual session, not less than 45 minutes and not longer than 60 minutes; and
  2. For a group session, not less than 90 minutes and not longer than 180 minutes.

- E. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall ensure that, for each referring court, a policy and procedure is developed, implemented, and complied with for providing misdemeanor domestic violence offender treatment that:
1. Established:
    - a. The process for a client to begin and complete misdemeanor domestic violence offender treatment;
    - b. The timeline for a client to begin misdemeanor domestic violence offender treatment;
    - c. The time-line for a client to complete misdemeanor domestic violence offender treatment, which shall not exceed 12 months;  
and,
    - d. Criteria for a client's successful completion of misdemeanor domestic violence offender treatment, including attendance, conduct, and participation requirements;
  2. Requires the licensee that provides misdemeanor domestic violence offender treatment to notify a client at the time of admission of the consequences to the client, imposed by the referring court or the licensee, if the client fails to successfully complete misdemeanor domestic violence offender treatment;
  3. Requires the licensee to notify the referring court or the entity that referred the client to the agency on behalf of the court, in writing, within a timeline established with the referring court or the entity that referred the client to the agency on behalf of the court, when any of the following occur:
    - a. The licensee determines that a client referred by the referring court has not reported for admission to the misdemeanor domestic violence offender treatment program,
    - b. The licensee determines that a client referred by the referring court is ineligible or inappropriate for the agency's misdemeanor domestic violence offender treatment program,
    - c. A client is admitted to the agency's misdemeanor domestic violence offender treatment program,
    - d. A client is voluntarily or involuntarily discharged from the agency's misdemeanor domestic violence offender treatment program,

- e. A client fails to comply with misdemeanor domestic violence offender treatment, or
    - f. A client completes misdemeanor domestic violence offender treatment;
  - 4. Is reviewed by the referring court or the entity that refers clients to the agency on behalf of the court before the agency provides misdemeanor domestic violence offender treatment;
  - 5. Requires that the review required in subsection (B)(6) be documented, to include:
    - a. The date of the review;
    - b. The name and title of the individual performing the review for the referring court; and
    - c. Changes to the policy and procedure requested by the referring court, if applicable;
  - 6. Requires the licensee to contact the referring court or entity that referred a client to the agency on behalf of the court at least once every 12 months after the date the licensee begins to provide misdemeanor domestic violence offender treatment to determine whether the referring court has made any changes in its procedures or requirements that necessitate changes to the licensee's policy and procedure;
  - 7. Is reviewed and revised as necessary by the licensee at least once every 12 months; and
  - 8. Is maintained at the agency.
- F. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall ensure that misdemeanor domestic violence offender treatment is provided by a staff member who:
- 1. Is either:
    - a. A behavioral health professional, or
    - b. A behavioral health technician with at least an associate's degree;
  - 2. Satisfies one of the following:
    - a. Has at least six months of full-time work experience with domestic violence offenders or other criminal offenders, or

- b. Is visually observed and directed by a staff member with at least six months of full-time work experience with domestic violence offenders or other criminal offenders; and
  - 3. Has completed at least 40 hours of education or training in one or more of the following areas within the four years before the date the individual begins providing misdemeanor domestic violence offender treatment:
    - a. Domestic violence offender treatment,
    - b. The dynamics and impact of domestic violence and violent relationships, or
    - c. Methods to determine an individual's potential to harm the individual or another.
- G. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall ensure that:
  - 1. In addition to meeting the training requirements in R9-20-206(B), a staff member completes at least eight hours of training, every 12 months after the staff member's starting date of employment or contract service, in one or more of the areas listed in subsection (C)(3), and
  - 2. Training required in this Section is documented according to R9-20-206(B)(4).
- H. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall ensure that a staff member completes an assessment of each client that, in addition to the requirements of R9-20-209, includes:
  - 1. Requesting the following information:
    - a. the case number or identification number assigned by the referring court;
    - b. Whether the client has any past or current orders for protection or no-contact orders issued by a court;
    - c. The client's history of domestic violence or family disturbances, including incidents that did not result in arrest;
    - d. The details of the misdemeanor domestic violence offense that led to the client's referral for misdemeanor domestic violence offense treatment, and
  - 2. Determining the client's potential to harm the client or another.

- I. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall ensure that a client who has completed misdemeanor domestic violence offender treatment receives a certificate of completion that includes:
  - 1. The case number or identification number assigned by the referring court or, if the agency has made three documented attempts to obtain the case number or identification number without success, the client's date of birth;
  - 2. The client's name;
  - 3. The date of completion of misdemeanor domestic violence offender treatment;
  - 4. The name, address, and telephone number of the agency providing misdemeanor domestic violence offender treatment; and
  - 5. The signature of an individual authorized to sign on behalf of the licensee.
- J. A licensee of an agency that provides misdemeanor domestic violence offender treatment shall:
  - 1. Provide the original of a client's certificate of completion to the referring court according to the timeline established in the licensee's policy and procedure,
  - 2. Provide a copy of the client's certificate of completion to the client, and
  - 3. Maintain a copy of the client's certificate of completion in the client record.

# BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT

Page 1 of 9

Wednesday, September 17, 2003

## COCHISE

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BH1291 06/30/2004	NATIVE AMERICANS FOR COMMUNITY	2717 NORTH STEVES BLVD., SUITE #11 FLAGSTAFF, AZ 86004	Mr, DANA RUSSELL 9285262968
NORTHERN ARIZONA SUBSTANCE ABUSE SERVIC			
BH1634 10/31/2003	NORTHERN ARIZONA SUBSTANCE	2101 NORTH 4TH STREET STE 215 FLAGSTAFF, AZ 86004	Ms, MARY ERHART 9287739376

## GILA

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
ALCOHOL COUNSELING & EDUCATIONAL SERVICES,			
BH1529 01/31/2004	ALCOHOL COUNSELING & EDUCATION	809 WEST LONGHORN PAYSON, AZ 85541	Ms, ELLEN BOLCKO 9284744111
SOUTHWEST BEHAVIORAL HEALTH SERVICES, INC.			
BH782 04/30/2004	RIM GUIDANCE CENTER, INC.	404 WEST AERO DRIVE PAYSON, AZ 85541	Mr, JEFF GREY 9284743303

## GRAHAM

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
SOUTHEASTERN ARIZONA BEHAVIORAL HEALTH SE			

# BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT

Wednesday, September 17, 2003

BH1583 SOUTHEASTERN ARIZONA BHS INC  
04/30/2004

620 CENTRAL AVENUE  
SAFFORD, AZ 85546

Mr, JIM RUBIO/ S. ARCH  
9284284550

## GREENLEE

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
SOUTHEASTERN ARIZONA BEHAVIORAL HEALTH SE			
BH425 02/28/2004	SOUTHEASTERN AZ BHS INC	CORONADO BOULEVARD AND BURRO ALLEY MORENCI, AZ 85540	Mr, JIM RUBIO/ S. ARCH 9288654531

## MARICOPA

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
ADVANCED COUNSELING CENTER			
BH2048 05/31/2004	ADVANCED COUNSELING CENTER	4600 SOUTH MILL AVENUE, SUITE #280 TEMPE, AZ 85282	Mr, JOE VIGNEUX 4806559550
ARIZONA BEHAVIORAL COUNSELING AND EDUCATIC			
BH1842 08/31/2003	ARIZONA BEHAVIORAL COUNSELING & EDUCATION	6516 NORTH 7TH STREET, SUITE #106 PHOENIX, AZ 85014	Ms, VICKI PEEBLES 6027881116
AVALON COUNSELING, L.L.C.			
BH1193 10/31/2003	AVALON COUNSELING, LLC	1660 SOUTH ALMA SCHOOL ROAD, SUITE #223 MESA, AZ 85210	Ms, JULIE CASTANEDA 4804914259
CENTRAL COUNSELING AND EDUCATION SERVICES			
BH1633 11/30/2003	CENTRAL COUNSELING & EDUCATION	1802 EAST THOMAS, SUITE #6 PHOENIX, AZ 85016	Ms, LYDIA MOLINA 6022359237
Chrysalis Shelter For Victims of Domestic Violence, Inc.			
BH2224 11/30/2003	CHRYSALIS SHELTER FOR VICTIMS	1010 E MCDOWELL, SUITE 301 PHOENIX, AZ 85006	Ms, PATRICIA KLAHR 6029559059
CONCEPTS FOR CHANGE, INC.			
BH1690 06/30/2004	CONCEPTS FOR CHANGE, INC.	5008 WEST GLENDALE AVENUE GLENDALE, AZ 85301	Ms, LYNDA HEMANN 6239309317

**BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT**

Wednesday, September 17, 2003  
COURT SUPPORT SERVICES, LLC

BH2176 COURT SUPPORT SERVICES LLC  
11/30/2003

4205 NORTH 7TH STREET STE 312  
PHOENIX, AZ 85013

Ms, JUDITH BAUERSFELD  
4806295994

**DESERT WINDS COUNSELING**

BH1871 DESERT WINDS COUNSELING  
02/28/2003

925 NORTH STAPLEY, SUITE A  
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Mrs, DAREN POVAR  
4804610795

**DW COUNSELING CENTER, LLC**

BH2258 DESERT WINDS COUNSELING  
02/29/2004

925 N STAPLEY DR, #A  
MESA, AZ 85203

Mr, SCOTT SMITH  
4804610795

**DYNAMIC LIVING COUNSELING, INC.**

BH1992 DYNAMIC LIVING COUNSELING INC  
11/30/2003

5150 NORTH 16TH STREET, SUITE B-132  
PHOENIX, AZ 85016

Ms, JUNE BERRINGTON  
6022772112

**JUSTICE SERVICES, INC.**

BH1118 JUSTICE SERVICES, INC.  
05/31/2004

423 NORTH COUNTRY CLUB DRIVE, SUITE #35  
MESA, AZ 85201

Ms, JUDY MATTINGLY  
4804648581

BH1652 JUSTICE SERVICES, INC.  
12/31/2003

7447 EAST EARLL DRIVE, SUITE #101  
SCOTTSDALE, AZ 85251

Ms, JUDY MATTINGLY  
4809498871

BH2038 JUSTICE SERVICES, INC  
01/31/2004

201 EAST MONTEREY WAY  
PHOENIX, AZ 85012

Ms, JUDY MATTINGLY  
6022643881

**Life Skills Counseling, Inc**

BH2301 LIFE SKILLS COUNSELING, INC  
05/31/2004

16901 N BOSWELL BLVD STE B  
SUN CITY, AZ 85351

Ms, VIRGINIA PERSON  
6239749504

**MARICOPA ADULT RESOURCE CENTER, LLC**

BH1868 MARICOPA ADULT RESOURCE CTR  
11/30/2003

4425 WEST GLENDALE AVENUE, SUITE #2  
GLENDALE, AZ 85301

Mr, DAVID GLEGHORN  
6234632582

**NATIVE AMERICAN COMMUNITY HEALTH CENTER, I**

**BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT**

Wednesday, September 17, 2003

BH1211 NATIVE AMERICAN COMMUNITY HEAL  
02/29/20043008 NORTH 3RD STREET, SUITE #310  
PHOENIX, AZ 85012Mr, MICHAEL ALLISON  
6022795262

## NEW HORIZONS COUNSELING SERVICE

BH1352 NEW HORIZONS COUNSELING SVCS  
10/31/20036151 WEST OLIVE AVENUE, SUITE 3  
GLENDALE, AZ 85302Mr, CLEON CARDER  
6239396567

## Rio Salado Behavioral Health System, Inc.

BH2194 RIO SALADO BEHAVIORAL HEALTH  
12/31/20031308 W CAMELBACK ROAD  
PHOENIX, AZ 85013Mr, TINO DE ANDA  
6022529048

## SAGE COUNSELING, INC.

BH2139 SAGE COUNSELING, INC  
11/30/2003303 NORTH CENTENNIAL WAY, SUITE #250  
MESA, AZ 85201Mr, STEPHEN GRAMS  
4806493352

## SCOTTSDALE TREATMENT INSTITUTE, PLC

BH1679 SCOTTSDALE TREATMENT INSTITUTE  
04/30/20048100 EAST INDIAN SCHOOL ROAD, SUITE #1 EAST  
SCOTTSDALE, AZ 85251Mr, JOHN BUTLER  
4804299044

## STEVEN J ACHESON-LIFE MANAGEMENT SYSTEMS

BH2099 LIFE MANAGEMENT SYSTEMS  
09/30/200310030 N 32ND STREET  
PHOENIX, AZ 85028Ms, ZOE ACHESON  
6024041566

## THE CENTER FOR RECOVERING FAMILIES, INC.

BH2079 THE CENTER FOR RECOVERING FAMI  
03/31/20044325 NORTH 75TH STREET, SUITE #102  
SCOTTSDALE, AZ 85251Mrs, TERRELL SMITH  
4809453115

## WEST VALLEY COURT DIVERSION SERVICES, INC.

BH2015 WEST VALLEY COURT DIVERSION SERVICES, INC  
12/31/20038401 WEST MONROE  
PEORIA, AZ 85345Ms, DAWN RUSSO  
6235720489

## WESTERN JUDICIAL SERVICES, INC.

BH1358 WESTERN JUDICIAL SERVICES, INC  
12/31/20039550 WEST VAN BUREN, SUITE #18  
TOLLESON, AZ 85353Ms, TONI KARRE  
6239368828

# BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT

Wednesday, September 17, 2003

## MOHAVE

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
ABC THERAPY INCORPORATED			
BH1753 01/31/2004	ABC THERAPY INCORPORATED	1185 HANCOCK ROAD, SUITE #1 BULLHEAD CITY, AZ 86442	Mr, JULIO LANDERO 9287638120
BEHAVIORAL HEALTHCARE OPTIONS, INC.			
BH1818 08/31/2003	BEHAVIORAL HEALTHCARE OPTIONS	3003 HIGHWAY 95, SUITE #104 BULLHEAD CITY, AZ 86442	Mr, JONATHAN BURCH 9287630250
SOCIAL SVCS. INTERAGENCY COUNCIL OF LAKE HA			
BH1917 06/30/2004	SOCIAL SVCS INTERAGENCY	1940 MESQUITE AVENUE, SUITE I LAKE HAVASU CITY, AZ 86403	Ms, PATRICIA CREASON 9284535800
WESTCARE ARIZONA I, INC.			
BH1730 10/31/2003	COMMUNITY INVOLVEMENT CENTER	1748 HIGHWAY 95, SUITE 14 BULLHEAD CITY, AZ 86439	Mr, CHARLES LEHMAN 9287631945

## NAVAJO

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
WHITE MOUNTAIN COUNSELING			
BH1884 02/29/2004	WHITE MOUNTAIN COUNSELING	1201 EAST COOLEY, SUITE A SHOW LOW, AZ 85901	Ms, JEANNIE TAGUE 9285323238
WINSLOW GUIDANCE ASSOCIATES, INC.			
BH1206 11/30/2003	WINSLOW GUIDANCE ASSOCIATES	1301 WEST SECOND STREET WINSLOW, AZ 86047	Ms, URSULA BAKER 9282892650

## PIMA

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
A REAL CHOICE COUNSELING, INC.			
BH2042 05/31/2004	A REAL CHOICE COUNSELING INC	2030 EAST BROADWAY, SUITE #107 TUCSON, AZ 85719	Mr, JEAN PRICE 5209810632

**BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT**

Wednesday, September 17, 2003

**ARIZONA CENTER FOR MIND/BODY THERAPY**BH2027 ARIZONA CENTER FOR MIND/BODY  
12/31/20036400 EAST TANQUE VERDE, SUITE B  
TUCSON, AZ 85715Dr, DALE WHITNEY  
5207212464**ARIZONA FAMILY THERAPY CLINIC, INC.**BH2007 ARIZONA FAMILY THERAPY CLINIC  
02/29/20042033 EAST SPEEDWAY, SUITE #201  
TUCSON, AZ 85719Ms, LIBBY TIMMONS  
5203275522**AZTEC COUNSELING SERVICES, INC.**BH1612 AZTEC COUNSELING SERVICES INC  
08/31/20036816 NORTH ORACLE ROAD, SUITE #310  
TUCSON, AZ 85704Ms, JENNIFER VANHOESEN  
5202971923**BRIDGES**BH2208 BRIDGES  
01/31/2004800 N SWAN RD STE 100  
TUCSON, AZ 85711Ms, ALEXIS GRAE  
5203201595**CACTUS COUNSELING ASSOCIATES**BH2035 CACTUS COUNSELING ASSOCIATES  
02/29/2004201 WEST CUSHING STREET  
TUCSON, AZ 85701Ms, TERRY GRAY  
5207983659**CENTER FOR LIFE SKILLS DEVELOPMENT, LLC**BH1985 CENTER FOR LIFE SKILLS DEVELOP  
10/31/20032131 WEST INA ROAD, BUILDING C  
TUCSON, AZ 85741Ms, ROBERTA LEWUSZ  
5209069305**COUNSELING & CONSULTING SERVICES, INC.**BH1681 COUNSELING & CONSULTING SVCS  
07/31/2003738 NORTH 5TH AVENUE, SUITE #215  
TUCSON, AZ 85705Mr, DAVID HARVEY  
5208820090**FAMILY COUNSELING AGENCY OF TUCSON, INC.**BH447 FAMILY COUNSELING AGENCY  
09/30/2003209 SOUTH TUCSON BLVD, SUITE #1  
TUCSON, AZ 85716Ms, MARY WILSON  
5203274583**FUERZA Y ESPERANZA COUNSELING SERVICES**BH1964 FUERZA Y ESPERANZA COUNSELING  
07/31/20036639 SOUTH 12TH AVENUE  
TUCSON, AZ 85706Ms, LINDA THURSTON  
5202950999**MARANA HEALTH CENTER, INC.**

# BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT

Wednesday, September 17, 2003

BH718	MARANA HEALTH CENTER, INC	13644 NORTH SANDARIO ROAD MARANA, AZ 85653	Ms., MICHELLE ELLIS 5206824111
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## NEXT STEP COUNSELING

BH1939 06/30/2003	NEXT STEP COUNSELING	630 NORTH CRAYCROFT, SUITE #119 TUCSON, AZ 85711	Mr, JOSEPH BUBALA 5207470405
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## PERCEPTION COUNSELING

BH2316 07/31/2004	PERCEPTION COUNSELING	738 N 5TH AVE STE 216 TUCSON, AZ 85705	, ROGER AULDS 5208614296
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## PORTABLE PRACTICAL EDUCATIONAL PREPARATIO

BH367 05/31/2004	PPEP BEHAVIORAL HEALTH SERVICE	111 LA MINA AVENUE AJO, AZ 85321	Ms, CARLYN HACKER 5203875232
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BH832 10/31/2003	PPEP BEHAVIORAL HEALTH SERVICE	806 EAST 46TH STREET TUCSON, AZ 85713	Ms, ELISE ARNOLD 5207925704
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## REFLECTION FAMILY SERVICES, INC.

BH1076 01/31/2004	REFLECTION FAMILY SERVICES INC	2530 EAST BROADWAY, SUITE A TUCSON, AZ 85716	Ms, TERRY STOE 5207950981
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## THE CENTER FOR LIFE SKILLS DEVELOPMENT, LLC

BH2276 04/30/2004	THE CENTER FOR LIFE SKILLS DEV	2231 W INA ROAD TUCSON, AZ 85741	Ms, ROBERTA LEWUSZ 5202296220
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## TREATMENT ASSESSMENT SCREENING CENTER, I

BH1923 05/31/2004	TREATMENT ASSESSMENT SCREENING	244 WEST DRACHMAN TUCSON, AZ 85705	Ms, BARBARA ZUGOR 5209032525
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## PINAL

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
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ARIZONA TREATMENT INSTITUTE, LLC

# BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT

Wednesday, September 17, 2003

BH1935 ARIZONA TREATMENT INSTITUTE  
08/31/2003

1927 NORTH TREKELL ROAD, SUITE D  
CASA GRANDE, AZ 85222

Mr, DONALD NICHOLS  
5208369788

HORIZON HUMAN SERVICES, INC.

BH1220 MICHAEL J. CEPELLO MEMORIAL  
02/29/2004

222 EAST COTTONWOOD LANE  
CASA GRANDE, AZ 85222

Mr, NORMAN MUDD  
5208361688

PINAL HISPANIC COUNCIL

BH1650 CENTRO DE AYUDA  
02/29/2004

712 NORTH MAIN  
ELOY, AZ 85231

Mr, RALPH VARELA  
5204667765

BH889 CENTRO DE UNIDAD  
02/29/2004

556 SOUTH ARIZONA BOULEVARD  
COOLIDGE, AZ 85228

Ms, TERESA MENCHACA  
5207237405

## SANTA CRUZ

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
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SOUTHEASTERN ARIZONA BEHAVIORAL HEALTH SE

BH1683 NOGALES OUTPATIENT CLINIC  
05/31/2004

32 BOULEVARD DEL RAY DAVID  
NOGALES, AZ 85621

Ms, JAQUELINE DODDS  
5202819189

## YAVAPAI

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
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HIGH COUNTRY HEALTH CENTER

BH1803 HIGH COUNTRY HEALTH CENTER  
05/31/2004

843 MILLER VALLEY ROAD, SUITE #203  
PRESCOTT, AZ 86301

Ms, TERRY LORD  
9284431212

TREATMENT ASSESSMENT SCREENING CENTER, I

BH2097 TASC  
03/31/2004

609 WEST GURLEY  
PRESCOTT, AZ 86305

Ms, BARBARA ZUGOR  
9284456844

## YUMA

ID/EXP	NAME	ADDRESS	ADMINISTRATOR
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CATHOLIC COMMUNITY SERVICES OF SOUTHERN A

## BEHAVIORAL HEALTH FACILITIES THAT PROVIDE MISDEMEANOR DOMESTIC VIOLENCE OFFENDER TREATMENT

Page 9 of 9

Wednesday, September 17, 2003

BH1236 CATHOLIC COMMUNITY SERVICES  
11/30/2003

690 EAST 32ND STREET  
YUMA, AZ 85365

Ms, MARJORIE CAFFARO  
9283419400

LOIS FAUST-FAZIO COUNSELING AGENCY

BH951 LOIS FAUST-FAZIO COUNSELING  
07/31/2003

661 EAST 32ND STREET, SUITE C  
YUMA, AZ 85365

Ms, LOIS FAUST-FAZIO  
9283449894

## **Appendix H**

### **Sample Foundational Questions**

The proponent of an item of evidence is required to lay foundation for its admission. It is important to remember that a claim of insufficient foundation cannot be raised on appeal unless the alleged defect in foundation is pointed out to the trial court. State v. Guerrero, 173 Ariz. 169, 840 P.2d 1034 (App. 1992); Packard v. Reidhead, 22 Ariz. App. 420, 528 P.2d 171 (1974).

#### **A. Diagram**

1. Let me show you what has been marked for identification purposes as Exhibit \_\_\_\_.
2. Do you recognize this exhibit?
3. What is it?
4. Did you prepare the diagram?
5. When and where did you prepare it?
6. Is it drawn to scale?
7. Does it accurately reflect the relationship of the objects shown to each other?
8. Are distances and directions shown?
9. Is this exhibit in substantially the same condition as when you originally prepared it?
10. *Offer the exhibit.*

#### **B. Photographs**

1. Let me show you what has been marked for identification purposes as Exhibit \_\_\_\_.
2. Do you recognize it?
3. What is it?
4. Does this photograph marked as Exhibit Number \_\_\_\_ for identification fairly and accurately depict the subject matter therein? (On the date and time in question.)
5. What is it a picture of?
6. *Offer the exhibit.*

## C. Tape Recordings

### 1. 9-1-1 Tape Recordings: Custodian of Records

- a. Please state your name and job title.
- b. Where do you work?
- c. How long have you been employed as a \_\_\_\_\_?
- d. What are your job responsibilities?
- e. Do these responsibilities include 9-1-1 tape recordings?
- f. Is your Police Department required to maintain these records by policy or law?
- g. Did you bring 9-1-1 records to court today?
- h. Are you the custodian of those records?
- i. Let me show you what has been marked for identification purposes as: Exhibit\_\_\_\_\_.
- j. Are you familiar with those records?
- k. What are they?
- l. How did you get these records?
- m. Offer the exhibit.
- n. Can you tell from the records the address from which the call was made?  
[Remember for hearsay objections: pursuant to 17A A.R.S. Rules of Evid., Rule 803(8), the records being read are public records.]
- o. What was the address?
- p. Can you tell from the records the telephone number from which the call was made?
- q. What was the telephone number?
- r. Can you tell from the records the date and time when the call was made?

**2. Continue questions that relate this tape to the crime, e.g., address to which the officer was dispatched, which officer was dispatched, the DR number to which the tape relates, etc.]**

- a. How are 9-1-1 calls maintained by the your Police Department?
- b. Are these calls recorded as the call is being made?
- c. Are the tape recordings made in the normal course of police business?
- d. As part of your duties, do you make duplicated of 9-1-1 tape recordings?
- e. Explain how you go about making a copy of a 9-1-1 tape recording.
- f. If I showed you a tape, could you recognize it as a 9-1-1 tape?
- g. Let me show you what has been marked for identification purposes as: Exhibit \_\_\_\_.
- h. Do you recognize it?
- i. How do you recognize it?
- j. What is it?
- k. Is this a recording of the 9-1-1 call made for an incident at (*location of the crime*), on (*date of the crime*) at (*time of the call*) related to DR (*number of DR*)?
- l. *Offer the exhibit.*

**3. 911 Caller**

- a. What is your name?
- b. Did you call 9-1-1 on (*date*) at approximately (*time*)?
- c. From what telephone number did you call 9-1-1?
- d. Did someone answer the phone?
- e. Did you speak to that person?
- f. Prior to trial, at my request, did you listen to a cassette tape?

- g. Did that tape accurately represent the conversation you had with the 9-1-1 operator on *(date)*?
- h. I am handing you as Exhibit \_\_\_\_\_. Is this the tape that you listened to before trial? *(Suggestion: if the witness places her/his initials on the tape when s/he finishes listening to it, s/he can identify it as the same tape.)*
- i. Did the police respond after your 9-1-1 call?

**4. Witness Familiar with 9-1-1 Caller's Voice**

- a. What is your name?
- b. Do you know *(name of 9-1-1 caller)*?
- c. How do you know *(name of caller)*?
- d. How long have you known *(name of caller)*?
- e. Have you ever spoken to *(name of caller)* on the phone?
- f. Do you recognize *(name of caller)*'s voice on the phone?
- g. Prior to trial, at my request, did you listen to a cassette tape?
- h. I am handing you Exhibit \_\_\_\_\_. Is that the tape that you listened to before trial? *(Suggestion: if the witness places her/his initials on the tape when s/he finishes listening to it, s/he can identify it as the same tape.)*
- i. Did you recognize anyone's voice on that tape?
- j. Whose voice did you recognize?

**5. Other Tape Recordings**

- a. Let me show you what has been marked for identification purposes as: Exhibit \_\_\_\_\_.
- b. Do you recognize it?
- c. What is it?
- d. Were you present when the tape recording was made?

- e. When was it made? (*Date and time.*)
- f. Who was present when it was made?
- g. Where was this conversation held?
- h. Was the entire conversation recorded?
- i. Prior to trial, at my request, did you listen to Exhibit \_\_\_\_ for identification?
- j. Is this recording an accurate recording of the conversation?
- k. Have there been any changes, additions or deletions on that recording since the time of conversation?
- l. Do you know whose voices were recorded on this tape?
- m. Offer the exhibit.
- n. Would you please play the tape recording that has been marked as: Exhibit \_\_\_\_\_?

**6. Voice Identification**

- a. Do you know (person whose voice is being identified)?
- b. How long?
- c. Have you ever spoken to him/her?
- d. About how many times?
- e. When and where?
- f. Who was present?
- g. If the voice being identified is part of an unrecorded conversation:
  - i. On (*date*) did you hear a conversation between (*person whose voice is being identified*) and another person?
  - ii. Did you hear any other voice in that conversation?
  - iii. Did you recognize any of the voices?
  - iv. Whose voice(s) did you recognize?
  - v. Tell us the conversation.

- h. *If the voice being identified is on a tape introduced into evidence:*
  - i. Prior to trial, at my request, did you listen to Exhibit?
  - ii. Is the voice of (*person whose voice is being identified*) on Exhibit \_\_?
  - iii. Please identify her/his voice by the statements made when I play the tape.
  - iv. Please identify the other voices by the statements made when I play the tape.

## Appendix I

### Batterer Accountability Recommendations

Issue	Barriers	Recommendations	Strategies	Target Contact
1. Courts and prosecutors refer Domestic Violence Offenders to Anger management programs	Lack of approved Domestic Violence Offender Treatment Programs (DVOTP) in jurisdiction.	Judicial staff and prosecutors should be educated that anger management programs are not a substitute for approved Arizona Dept. of Health Services (ADHS) Domestic Violence Offender Treatment Programs (DVOTP).	Modification to DV Benchbook New judge orientation training  Educational training conferences for judicial staff	Administrative Office of the Courts  judges
2. Courts and prosecutors sometimes refer DV Offenders to an unlicensed DV Treatment Program or no treatment program at all.	Lack of approved Domestic Violence Offender Treatment Programs (DVOTP) in rural jurisdiction.	All DV offenders ordered or referred to a treatment program shall be required to complete a program certified by ADHS for DV offender treatment.	Develop a protocol between DVOTPs and courts to include monitoring of DV offenders ordered to treatment.  Educational training for judicial staff.	Administrative Office of the Courts  judges
3. Arizona lacks an adequate, domestic violence central database of misdemeanor criminal convictions across multiple jurisdictions.	Consequently, defendants are often considered to be first time offenders, when, in fact, they are not. This has a detrimental effect on both criminal sentencing and conducting treatment.	Additional modification to data systems may be necessary to capture offender treatment information.  Additional resources must be allocated.	Continue the efforts currently underway by Arizona Criminal Justice Commission, Administrative Office of the Courts, and others to complete a statewide database containing data on DV offenders' convictions, and those assigned to diversion, Orders of Protection, and Injunctions Against Harassment.	Administrative Office of the Courts  Arizona Criminal Justice Commission

4. Domestic Violence Offender Treatment Providers (DVOTPs) often complete screening assessments, evaluation, and treatment without background information regarding previous offender criminal convictions, police reports, pre-sentence reports, victim statements, etc.	Confidentiality issues. Limits on civilian access to criminal history information	Referring courts, Probation Departments and/or Prosecutors shall provide Domestic Violence Offender Treatment Providers (DVOTP) with pertinent information regarding the offender.  Agreements/Contracts between courts and DVOTPs must contain confidentiality provisions protecting victim information, or provide reports redacting victim information. Specifically, we suggest the Police Report (DR), Pre-Sentence Reports, and the offender's criminal record (in whatever form is found to be most appropriate for the referring party).	Develop and enhance protocols.	Committee on the Impact of DV in the Courts (CIDVC)  Prosecuting Attorney's Offices, judges, court,  Screening DVOTPs
5. There are currently no widely accepted sanction guidelines for offenders' non-compliance with treatment. Courts sometimes order very little or no consequences, or even dismiss cases after clients drop out of treatment.		Judicial discretion shall prevail, however courts should be cognizant of the impact of non-compliance with DVOTP. Courts should recommend responses that are timely, punitive and rehabilitative.		judges,  courts
6. Many clients have co-occurring substance abuse issues.		Courts and other referring parties shall support DVOTP's recommendations regarding substance abuse treatment.		judges, courts,  Prosecuting Attorneys Offices

7. There are currently no guidelines for the amounts of treatment offenders are required to complete.		First time offenders shall complete a minimum amount of treatment is 26 sessions (group, individual, etc.) over at least a 4-month period. Second offenses, a minimum shall be 36 additional sessions, and for a third offense, 52 sessions. In extenuating or unusual circumstances, courts, probation and prosecutors, and DVOTPs can jointly make other arrangements.		judges, courts,  Arizona Dept. Health Services
8. Judiciary or Probation Officers are sometimes making determinations regarding the type and amount of treatment required without consultation with individuals with clinical expertise in Domestic Violence Offender treatment.		DVOTP shall develop individualized case plans based on screening assessments. Any decisions regarding the required amount and type of treatment are made by a collaborative effort between people with Clinical Training and credentials and judges or prosecutors or probation.		judges, courts,  Prosecuting Attorney's Offices